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LEARNED HAND,
ALBANY, N. Y.

A COMPENDIUM

OF THE

LAW OF EVIDENCE.

BY THOMAS PEAKE, Esq.
SERGEANT AT LAW.

FROM THE FIFTH LONDON EDITION, WITH LARGE ADDITIONS.

THE AMERICAN EDITION
CONTAINING THE LARGEST COLLECTION EVER PUBLISHED,
OF DECISIONS IN THE DIFFERENT
STATE AND UNITED STATES COURTS.

BY JOSEPH P. NORRIS, JUN. Esq.

PHILADELPHIA :
PUBLISHED BY ABRAHAM SMALL.

1824.

Eastern District of Pennsylvania, to wit:

BE IT REMEMBERED, That on the twenty second day of September, in the forty-ninth year of the Independence of the United States of America, A. D. 1824, Abraham Small, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following to wit:

"A Compendium of the Law of Evidence. By Thomas Peake, Esq. Sergeant at Law. From the fifth London edition, with large additions. The American edition containing the largest collection ever published, of decisions in the different State and United States Courts. By Joseph P. Norris, jun. Esq.

In conformity to the act of the Congress of the United States, intituled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned." And also to the act, entitled, "An act supplementary to an act, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,

Clerk of the Eastern District of Pennsylvania.

Recd. May 13, 1902.

ADVERTISEMENT

OF THE AMERICAN EDITOR.

THE Editor of this edition of Mr. Peake's Compendium of the Law of Evidence, is well aware of the attention of late bestowed to this branch of legal learning ; and in offering to the profession this work, he by no means wishes to disparage the character or authority of any other on this subject.

The great object in view has been to collect the various decisions in the United States, as far as they could be procured, through the medium of the reporters, and to present them to the profession, consolidated, in reference to the text.

It will be found that in some instances he has been induced to extend his labours beyond what was absolutely required by the text, for the purpose of embracing many decisions, of importance in this country, arising from the different constitutions of the governments, and characters of the laws, under which we live.

In a few instances he has added some English cases, but only where the novelty of the subject, or the importance of the decision seemed to warrant such a departure from the plan of the work.

Uniformity in the decisions of the Courts of the different States on the same subject could not, in all cases, be expected, particularly when we bear in mind that the science

of jurisprudence, in the primitive state of the Colonies, was little else than "*rudes indigestaque moles*," and when the elements of the rules of decision were derived from the customs of the day, which formed the code of common law on which they were founded.

On the whole, the labour required from the Editor will be amply repaid, if his exertions shall procure what he has wished to obtain as a desideratum, at least on those points which arise on trials at *Nisi Prius*,—a book in which, reference to the adjudications of our Courts may be readily had; and where the ample store of judicial learning and talent is unfolded to view, without reference to the Digests, or seeking amidst the labyrinths of the reporters.

J. P. N. JUN.

Philadelphia,
1st September, 1824.

PREFACE

TO THE FIFTH LONDON EDITION.

THE following work is now, for the fifth time, presented to the profession. When originally published, the Author, as he then expressed, had in view a production which should be a companion on the circuit ; always at hand, and ready for immediate reference. He, therefore, put it forth merely as a practical *Compendium*, and not as an elaborate and theoretical Treatise, which he was well aware would swell it to a size that would entirely destroy its utility. He has still kept the same object in view, but has at the same time endeavoured to include all the points which are likely to occur at *Nisi Prius*. Since the publication of the last edition many new questions have occurred in the Courts at Westminster ; and the Banbury and Berkeley Peerages, and the Queen's Case in the House of Lords, have not only explained many points which might have been before considered as doubtful, but have also raised and decided points which had never before occurred. These have all been introduced into the work from time to time as they arose.

The author has long been aware that the Index and Table of Contents of the former editions were too general to afford that ready reference which the hurry of *Nisi Prius* so particularly requires. To remedy this defect,

an entire new Index and Table of Contents have been made, of such size and particularity, that it is confidently hoped no future inconvenience will be experienced on that account.

Although a very large quantity of new matter has been added in the present edition, yet, by printing in a closer type, the work has been brought into a smaller compass than the last edition. To the younger student who may wish to read, this will probably be no inconvenience; and to those whose experience renders nothing more than occasional reference necessary, the Author hopes that any small inconvenience which may be felt on account of the closeness of the letter, will be more than compensated by bringing the work into a portable size.

When the Author first turned his attention to the Law of Evidence, he was treading on almost new and unbroken ground; nothing but the unfinished publication of Lord C. B. GILBERT, and the little more than copy of it by Mr. Justice BULLER, being before the profession. Considerable differences of opinion had been entertained even by Judges on various points which had from time to time arisen, and therefore the Author deemed it necessary to insert, by way of Appendix, several cases which were considered as leading ones on the subject. Most of those disputed points having now become settled law, the Author deems it no longer necessary to continue many of the cases so published; and therefore has, in this respect, also considerably reduced the size of his book.

Temple,
1st January, 1822.

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A
COMPENDIUM
OF THE
LAW OF EVIDENCE.

CHAP. I.

OF THE GENERAL RULES OF EVIDENCE.

IN almost every case which presents itself for the consideration of a Court of justice, some fact is disputed by the litigating parties ; and the truth being unknown to those who are to decide, recourse must be had to the testimony of others. As this testimony is corroborated or opposed by the good or bad character of the witnesses who give it, by their concurrence or contradiction of each other ; or by the circumstances and probabilities of the story they relate ; the mind of the hearer arrives at a greater or less degree of certainty ; and, weighing these considerations together, is enabled to pronounce on the truth or falsity of the fact in dispute.

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The law of *England* has committed the power of estimating the *weight* and *credit* of the testimony so given to twelve persons, indifferently chosen from among the people, and sworn to decide according to the evidence which is laid before them : and as their judgment must in general be formed on the circumstances of each particular case, and can seldom be influenced by the authority of former decisions, I shall have occasion to say but little on this part of the subject.

In some cases, however, our Courts of justice have laid down rules for the direction of juries, and have said that the proof of certain circumstances shall be sufficient to raise a *presumption* of other facts which are not expressly proved. Though these rules are founded on general principles of reason, to which the

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understanding of every man must immediately assent, they may nevertheless be considered as settled rules of *law*, depending on authority; and as such the peculiar study of those whose profession it is to assist in the administration of justice.

There is indeed one species of evidence, the duty of estimating the weight and effect of which belongs wholly to the Judge; and in which the jury have no concern whatever. Matters of *record*, if put directly in issue, are tried by the Court, and when they come incidentally before a jury are considered as *conclusive* of the facts contained in them, and not to be disputed by any other evidence. The effect of these, therefore, depending entirely on legal reasoning, will necessarily require no inconsiderable part of our attention.

But the principal subject for the consideration of a practical lawyer is the *form* in which evidence is to be produced, and its *admissibility*. This is necessarily in all cases a pure question of *law*; it can never depend on any general and universal principles, but must always be governed by certain, fixed, and arbitrary rules. These rules can only be collected from former decisions, and the Judge alone is competent to determine how far they are applicable to the particular case. (a)

(a) The Court will always leave it to the jury as their province to determine the character of the witness, and the credit due to him, except in peculiar cases. *Fehl's* *les. v. Good*, 2 Binn. Rep. 495. *Rogers v. Briley*, 1 Hayw. Rep. 256.

But in *Consequa v. Willing et al.* 1 Peters' Rep. 235, it was held, that the Court may give an opinion to the jury on the weight of evidence, or they may decline to do so; and if it is doubtful, it is most proper to leave it to the jury.

In *Ross v. Gill et ux.* 1 Wash. Rep. 90, the rule in Virginia is laid down that where the question depends on the weight of evidence, the jury, and not the Court, are exclusively and uncontrovertably the judges. *S. P. Keel et al. v. Herbert*, *ibid.* 203. *Blincoe v. Berkeley*, 1 Call. Rep. 405. *Bogle v. Sullivan*, *ibid.* 561. *Martin et al. v. Stover*, 2 Do. 514. *Austin v. Richardson*, 8 Do. 206. *Fisher's exs. v. Duncan et al.* 1 H. & Munf. Rep. 563. *Whiteacre v. M'Ilhenny*, 4 Munf. Rep. 310. *Hollingsworth v. Dunbar*, 5 Do. 199. *Preston v. Bowen*, 6 Do. 277.

Unless it is withdrawn from their cognizance by a demurrer to the evidence. *ibid.* Et vide *Briggers v. Alderson*, 1 H. & Munf. Rep. 54. *M' Rae's exs. v. Wood ex. ibid.* 548. *Hardaway v. Munson*, 2 Munf. Rep. 230.

The law in North Carolina appears the same. *Rogers v. Briley*, 1 Hayw. Rep. 257. Illegal testimony ought never to go to the jury. *Lee v. Tapscott*, 2 Wash. Rep. 281. *Brown et al. v. May*, 1 Munf. Rep. 238. *Pensfield v. Carpenter*, 13 Johns. Rep. 360. *Miller v. Starks*, *ibid.* 517. *Irvine v. Cook*, 16 Do. 239. Et vide *Demancy v. Walker*, 1 Coxe's Rep. 83. *Smith v. Carrington*, 4 Cranch's Rep. 70.

A Judge may give an opinion on facts, but not a direction to the jury. *Porter v. M'Ilroy*, 4 Serg. & R. Rep. 442. Et vide *N. York Firemen Ins. Co. v. Walden*, 12 Johns. Rep. 513.

Whether there is any evidence, is a question for the Judge; whether it is sufficient, is for the jury. Vide *Wills v. Tucker*, 3 Binn. Rep. 370. 373. *Rosboom v. Bollington*, 17 Johns. Rep. 187. *James v. Harvey*, 1 Coxe's Rep. 228. *Harper v. Hampton*, 1 Har. & Johns. Rep. 622.

If he mistake the law and admit a witness who is not competent, or evidence which is not admissible; or, on the contrary, reject evidence which he ought to have admitted, the general mode of proceeding, which has of late years been adopted, is to move the Court for a new trial. But this is not the only remedy the party has; he may, by *Stat. Westminster 2*, tender a bill of exceptions to the opinion of the Judge, which he is obliged to seal, and then the question goes immediately to a Court of Error. So, if the party against whom the evidence is given, admit the legality and truth of it, but contend that it is not sufficient to maintain the issue, and the Judge leaves it to the jury, with directions to find against him, he may then, also, tender his bill of exceptions.(b)

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It is discretionary with the Judge whether a witness may be examined after defendant's counsel have summed up the evidence. *Alexander v. Byron*, 2 *Johns. Cas.* 318. *Duncan v. McCullough*, 4 *Serg. & R. Rep.* 482.

On an indictment for larceny, after the Deputy Attorney General had closed the evidence, and the defendant's counsel had summed up, the Court allowed further evidence to be given on behalf of the Commonwealth. *Commonwealth v. Tester*, 2 *Browne's Rep.* 247.

The strict rules of law, with regard to evidence, ought not to be extended to mercantile transactions. *Riches et al. v. Broadfield*, 1 *Dall. Rep.* 17. *S. P. Arnold v. Anderson*, 2 *Yates' Rep.* 93.

Necessity, either absolute or moral, is sufficient ground for dispensing with the usual rules of evidence. Per *TILGHMAN C. J.* 4 *Binn. Rep.* 326.

The maxim *nemo allegans turpitudinem suam audiendus est*, does not apply to witnesses. *Brown v. Downing*, 4 *Serg. & R. Rep.* 497.

Evidence must be relevant to the matter in issue. *Coe v. Button*, 1 *Serg. & R. Rep.* 298.

If the Court is divided in opinion on the admissibility of evidence, it must be received. *Les. of Milligan v. Dickson*, 1 *Peters' Rep.* 434, in note.—AM. ED.

(b) If the opinion of a Judge is filed of record, according to the provisions of the Act of 24th February, 1806, (4 *Sm. Laws*, 206) it is not necessary that a bill of exceptions should be taken previous to a writ of error. *Downing v. Baldwin*, 1 *Serg. & R. Rep.* 298.

There is nothing however to prevent a bill of exceptions, although the opinion of the Court is filed of record. *Bussler v. Nicely*, 1 *Serg. & R. Rep.* 431.

A Judge who files his opinion according to the Act, is not bound to return his notes of the evidence, given on the trial. *ibid.*

A writ of error lies in all cases, in which a Court of record has given a final judgment, or made an award in nature of it. *Commonwealth v. Judges of Common Pleas*, 3 *Binn. Rep.* 273.

But it ought to be on some point of law, arising on a fact not denied, in which either party is overruled by the Court. *Graham v. Camman*, 2 *Caines' Rep.* 168.

Quere, Whether the landlord of a defendant in ejectment who has taken the defence of the title, but is not party to the record, can sue out a writ of error. *Vanham v. Frick*, 3 *Serg. & R. Rep.* 278.

A party has a right to ask the opinion of the Court on any point of law relevant to the issue, and a refusal to give it is error. *Shaffer v. Landis*, 1 *Serg. & R. Rep.* 449.

Ch. I. But the most usual method, when the evidence is all on one side, is to demur to it, which takes the question to the Court.

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Brown v. Campbell, ibid. 176. *Hamilton v. Minor, 2 Do.* 70. *Vincent v. Lea, of Buff.* 4 *Do.* 398.

When a question is distinctly proposed to the Court below, it is error to refuse or evade giving a distinct answer. *Smith v. Thompson, 2 Serg. & R. Rep.* 49. *Powers v. M^r Ferron, ibid.* 44.

Quere, Whether the Supreme Court will reverse for error, on a point in which the law permits the Court below to exercise their discretion. *Duncan v. M^r Cul-lough, 4 Serg. & R. Rep.* 482.

The granting or refusing an amendment in cases in which the Court below exercise a discretionary power is not assignable as error. *Ordrenewaux v. Prady, 6 Serg. & R. Rep.* 510.

The opinion of a Judge, concerning facts delivered in his charge, is not the subject of a writ of error. If he express an opinion on facts, not warranted by the evidence, the only remedy is by a motion for a new trial. *Burd v. Danisdale, 3 Binn. Rep.* 80. *Long v. Ramsay, 1 Serg. & R. Rep.* 72. *Brown v. Campbell, ibid.* 176. *Graham v. Graham, ibid.* 330. *Hamilton v. Minor, 2 Do.* 70. *Renn v. Penn. Hospital, ibid.* 413. *Poorman v. Smith's exs. ibid.* 464. *Herwood v. Cheeseman, 3 Do.* 500.

A bill of exceptions may be tendered to the opinion of the Court, at any stage of the case, before the jury have delivered their verdict, but not to a point of evidence. *Jones v. Ins. Co. N^o America, 4 Dall. Rep.* 246. *S. C. 1 Binn. Rep.* 38. *Sikes v. Ransom, 6 Johns. Rep.* 279.

Irregularities in the conduct of the jury in the Court below, are not examinable in the Court of Error. *U. States v. Gillies, 1 Peters' Rep.* 159.

It lies to the opinion of the Court of Common Pleas, on the trial of a feigned issue from the Register's Court. *Vansant v. Boileau, 1 Binn. Rep.* 444.

But not for rejecting testimony on a summary motion for relief. *Shortz v. Quigley, 1 Binn. Rep.* 222.

It will to the opinion of the Judge in his charge to the jury. *Church v. Hubbard, 2 Cranch's Rep.* 239. *Smith v. Carrington, 4 Do.* 63.

But it will not, for rejecting as inadmissible, a witness, intended to prove a fact, not pertinent to the issue. *Turner v. Fendall, 1 Cranch's Rep.* 132. Et vide *Phoenix Ins. Co. v. Pratt, 2 Binn. Rep.* 308.

On a writ of error, the bill of exceptions is conclusive on the parties, and the Court will not presume any material part of the evidence omitted. *Bingham v. Cabbot, 3 Dall. Rep.* 38. Et vide *Huntington v. Champlin, Kirb. Rep.* 168.

After a trial on the general issue, a bill of exceptions bringing into question the whole controversy, is not admissible. *M^r Donald v. Fisher, Kirb. Rep.* 339. *Wadsworth v. Sanford, ibid.* 456. Et vide *Van Gordon v. Jackson, 5 Johns. Rep.* 467. *Frier et al. v. Jackson ex. d. Van Allen et al. 8 Do.* 387.

A bill of exceptions ought to be presented at the trial, and the Court are not bound to seal it at a subsequent term. *Sikes v. Ransom, 6 Johns. Rep.* 279.

On a bill of exceptions the whole record is before the Court, and if any error appear, they will reverse the judgment, though they think the Court below decided correctly on the point on which the bill is founded. *Murdock v. Herndon's exs. 4 H. & Munf. Rep.* 200. Sed vide *Phoenix Ins. Co. v. Pratt, 2 Binn. Rep.* 308.

If an instrument of writing be stated in a bill of exceptions to have been offered in evidence at the trial, and no objection appears to have been made to the proof of its execution, it is to be presumed to have been duly proved or admitted. *Newlin v. Newlin, 1 Serg. & R. Rep.* 275.

The Court will not travel out of the record to find matter to support the bill of exceptions. *Clarke v. Russell, 3 Dall. Rep.* 422. n. *Baring v. Shippen, 2 Binn. Rep.* 168.

out of which the record issues, without leaving it to the jury. (c) When a party demurs to evidence, he ought to admit the whole effect of the evidence, and not merely the facts which compose it, so that if it be only presumptive, he must distinctly admit

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Hunter, 2 H.
Black. 187.

Nor where the record stated the nature of the evidence, and that no other was admitted, will the Court inquire if proper evidence was rejected. *Smith v. Walker*, 1 *Call's Rep.* 23. Vide *Wroe v. Washington*, 1 *Wash. Rep.* 362.

If the transcript of a record not relevant to the issue is read without opposition, it is not error that the jury were permitted to judge of its correctness. *Coe v. Hutton*, 1 *Serg. & R. Rep.* 398.

But a judgment will be reversed, because the facts were imperfectly stated in the bill of exceptions. *Barret v. Tuzewell*, 1 *Call's Rep.* 215. *Beattie v. Tabb's adms.* 2 *Munf. Rep.* 254.

It is not error for the Court to refuse to instruct the jury, after being sworn, and before evidence introduced, to render a special verdict. *Woodward v. Woodson's heirs*, 6 *Munf. Rep.* 227.

A writ of error *coram nobis* for error in fact, lies in *Pennsylvania* in the Common Pleas. *Day v. Hamburg*, 1 *Browne's Rep.* 75.

In a criminal case, it is *ex gratia*, and will not lie until final judgment rendered. *Miles v. Rempublican*, 4 *Yeates' Rep.* 319. So there must be a special allocatur. *Shaffer v. Same*, 3 *Do.* 39. In *New York*, it seems no bill of exceptions will lie in a criminal case. *The People v. Holbrook*, 13 *Johns. Rep.* 90.

A judgment may be affirmed in part, and reversed in part, as where it is good for the debt, but bad for the costs. *Swearingen v. Pendleton*, 4 *Serg. & R. Rep.* 396. *Nelson v. Andrews*, 2 *Mass. Rep.* 164. *Glover v. Heath*, 3 *Do.* 252. *Waite v. Garland*, 7 *Do.* 453. *Whiting v. Cochran*, 9 *Do.* 532. *Cummings et al. v. Pruden*, 11 *Do.* 906. Et vide in *New York*, *Smith v. Jansen*, 8 *Johns. Rep.* 86. *S. P. Bradshaw v. Callaghan*, *ibid.* 435.

In a criminal case, a judgment cannot be affirmed in part, and reversed in part. *Jackson v. Commonwealth*, 2 *Binn. Rep.* 79. Sed vide *Duncan v. Commonwealth*, 4 *Serg. & R. Rep.* 451.

A writ of error will lie in a case where judgment has been arrested. *Skinner v. Robeson*, 4 *Yeates' Rep.* 375. *Benjamin v. Armstrong*, 2 *Serg. & R. Rep.* 392. Sed contra in *New York*, *Fish v. Weatherwax*, 3 *Johns. Cas.* 215. But where judgment has been given for the plaintiff, and is arrested, he may move for judgment against himself, in order to bring a writ of error. *ibid.*

As to the form of a bill of exceptions, vide *Clarke v. Russell*, 3 *Dall. Rep.* 419. n. *Gordon v. Browne*, 3 *Ben. & Munf. Rep.* 219.

In *Virginia* it must be signed by a majority of the Justices present. *ibid.* 224.)

No writ of error lies under the Judiciary Act of 1789, c. 20. s. 23, to the Supreme Court of the *U. States*, for any error of fact. *Penhallam v. Doane*, 3 *Dall. Rep.* 54.

Where a judgment, though informal and defective, is such a one on which an execution could issue, the party injured is entitled to his writ of error. *Wilson v. Daniel*, *ibid.* 401.

Under the above mentioned Act of Congress, a writ of error lies only from the final judgment of the Circuit Court. *Rutherford v. Fisher*, 4 *Dall. Rep.* 22.—*AX. Ed.*

(c) In *Pennsylvania*, whether the evidence be written or parol, a demurrer may be offered, and if to a deed, it must be set out in *hec verba*. *Hurst v. Dippe*, 1 *Dall. Rep.* 20.

If the Judge who tries the cause, errs in directing a joinder in demurrer, it is good cause for the Court in Bank to order a *verûre de novo*. *Duerhagan v. U. S. Ins. Co.* 2 *Serg. & R. Rep.* 185.

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every conclusion which the jury might have drawn from it. If he does not do this, the other party is not obliged to join in demurrer; and if he does so join, a *verdict de novo* must be awarded, for the Court cannot draw the the conclusion (d) The want of attention to this distinction between *evidence* and *facts*, is often productive of much inconvenience in the course of legal proceedings. The finding of facts is the peculiar province of a jury, and if not stated on the record where any matter is submitted to the Court for their opinion in point of law, however strong the evidence of those facts may appear, the Court cannot

In *Virginia*, unless the Court think the case clear against the party offering the demurrer, it will be allowed at any time before the jury retire, although the party offering it, may have examined witnesses, and the whole evidence on both sides be stated. *Hoyle v. Young*, 1 *Wash. Rep.* 151.

But if the evidence be decisive against the party offering to demur, the Court may refuse to compel the other party to join in it. *Thwaitt et al. v. Finch*, 1 *Wash. Rep.* 217. *Wroe v. Washington et al.* *ibid.* 357. *Harrison v. Brock*, 1 *Munf. Rep.* 22.

Where the plaintiff's evidence is not doubtful and uncertain, but defective only, the defendant may demur. *Knox v. Garland*, 2 *Call's Rep.* 241. Vide *Cunningham v. Herndon*, *ibid.* 530.

But where the parol evidence is vague, a party will not be compelled to join in it, unless the party offering it, will admit every fact and conclusion which such evidence may prove. *Hyers v. Wood*, 2 *Call's Rep.* 588.

If it appears on a demurrer to evidence, that the plaintiff ought not to recover, the Court cannot set it aside, and grant a new trial, but must enter judgment for the defendant. *Knox v. Garland*, 2 *Call's Rep.* 241.

In a demurrer to evidence, the evidence on both sides ought to be inserted. *Hyers v. Green*, *ibid.* 555. *Same v. Wood*, *ibid.* 574.

In a writ of right, if the demandant demur, he must shew title in himself. *ibid.*

In *Connecticut*, if the parties please, they may demur to parol evidence; but neither party can be compelled to join in it. *Town of Hampton v. Town of Windham*, 2 *Root's Rep.* 199. *Fowler v. Maccomb*, *ibid.* 308. Et vide, *Bremster v. Dana*, 1 *Root's Rep.* 266.

A similar decision was made in the case of *Young v. Black*, 7 *Cranch's Rep.* 565. Et vide, *Walker v. Kendall*, *Hurd. Rep.* 408.

In *Young v. Black*, 7 *Cranch's Rep.* 565, it was held to be a matter of discretion with the Court, whether it will compel a party to join in demurrer to evidence.—AM. ED.

(d) On a demurrer to evidence, the Court will infer such facts as the jury would have done, had the cause been left to their decision. *Patrick v. Hallet et al.* 1 *Johns. Rep.* 241. *Biggers v. Alderson*, 1 *H. & Munf. Rep.* 60. *Pawling v. U. States*, 4 *Cranch's Rep.* 219. *Stephens v. White*, 2 *Wash. Rep.* 203.

Every thing is to be considered as admitted on a demurrer to evidence, which a jury might reasonably infer from it. *Lewis v. Few*, 5 *Johns. Rep.* 29. *Steinback v. The Columb. Ins. Co.* *Col. & Caines' Cas.* 374. *S. C.* 2 *Caines' Rep.* 134. *Smith v. Steinback*, 2 *Caines' Cas. Er.* 158. *Snowden v. Phenix Ins. Co.* 3 *Binn. Rep.* 457. *Town of Hampton v. Town of Windham*, 2 *Root's Rep.* 199. *Patrick v. Ludlow*, 3 *Johns. Cas.* 10. *Forbes v. Church*, *ibid.* 159.—AM. ED.

supply this defective finding.(e) The conclusion resulting from the whole should be found and stated by the jury.

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The only use of evidence being to ascertain the truth of disputed facts, it follows, that none is required in support of those allegations which are not denied ; and the admission of any fact on the record, or by any other formal act in the course of a cause, not only prevents the necessity of proof, but precludes the party making such admission from offering any evidence to the contrary.(f) But when either party has made an affirmative

(e) On a special verdict, the Court can intend nothing which is not found. *Jenks v. Hallet*, 1 *Caines' Rep.* 60. Et vide *Tunnell et ux. v. Watson et ux.* 2 *Munf. Rep.* 283.

The fact of fraud not being found by a jury in a special verdict, cannot be presumed. *Druguet v. Rhinclander*, 1 *Caines' Cas. in Er.* xxxvii.

In a special verdict the facts themselves should be explicitly found. *Henderson v. Allens*, 1 *H. & Munf. Rep.* 235.

It is not necessary that fraud be expressly found, *eo nomine*, if facts amounting to it in legal construction be found. *Robertson v. Ewell*, 3 *Munf. Rep.* 1.

A case concludes the parties making it, but is not conclusive as to third persons. *Neilson v. Columb. Ins. Co.* 1 *Johns. Rep.* 301.—*Am. Ed.*

(f) Where the parties agreed that any matter might be given in evidence before the Sheriff, which could not be given on a trial, or could have been pleaded, an inquiry will not be set aside, because the Sheriff admitted improper, or rejected proper evidence. *Sharp v. Dusenbury*, 2 *Johns. Cas.* 117, *S. C. Coleman's Cas.* 134.

An admission in a case concludes the party making it. *Vanderpoort et al. v. Smith*, 2 *Caines' Rep.* 155.

If A. admits that B. signed the note jointly with him, but says that B. signed it as security only, the whole admission must be taken together. *Hopkins v. Smith*, 11 *Johns. Rep.* 161.

No regard will be paid by the Court to any agreement not reduced to writing. *Shippen's lessee v. Bush*, 1 *Dall. Rep.* 251.

An agreement of a party, when not attached to the record, must be considered as a concession for that trial only. *Pearl v. Allen*, 1 *Tyl. Rep.* 4.

An agreement of attorneys in the Court below, to abide by the opinion of a professional gentleman, whether restitution of the premises should be made to the plaintiff in error, from whom they had been taken by a *habere facias*, was enforced by the Supreme Court. *Cahill v. Benn et al.* 6 *Binn. Rep.* 99.

An agreement was entered into, to argue a case before the Judges of the Circuit Court, and their opinion to be conclusive ; the case was argued before one Judge, on the change of the judiciary system. Held, that the parties were bound by the agreement, and that no appeal would lie from his judgment. *Galbraith et al. v. Cook*, 4 *Yeates' Rep.* 551.

The right of appeal from an award of arbitrators when given by an Act of Assembly, cannot be taken away, except by an agreement in writing, made part of the proceedings in Court, or before a justice, when the suit is before him. *Dawson v. Condy*, 7 *Serg. & R. Rep.* 366.

A party is not bound by an admission of his, in an offer tending to a compromise which is not accepted. *Williams v. Price*, 5 *Munf. Rep.* 507. Et vide *Herr v.*

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allegation which is denied by his adversary, either by a traverse of that particular fact, or by a general denial of the whole case where that mode of pleading is permitted, the party whose allegation is so denied is in general required to prove it; for the negative not admitting in its nature of direct proof, he who denies a fact is not called upon to give that evidence which can only be circumstantial, till some evidence has been given to prove the fact alleged.* This general rule, however, is liable to exception in cases where a man is charged with not doing an act which by the law he is liable to do; for the law presumes that

Slough, 2 *Browne's Rep.* 112, n. *Sloucan v. Perkins*, 3 *Serg. & E. Rep.* 295. *Baird v. Bice*, 1 *Call's Rep.* 26.

Where the parties to a suit consented to give in evidence, under the general issue, special matter not allowed by the rules of pleading, the Court refused to permit such a course, and ordered the pleadings to be set aside. *Kelllogg v. Ingersoll*, 1 *Mass. Rep.* 5.

In a criminal case the waiver of any right, ought to be made of record to bind the defendant. *Commonwealth v. Andrews*, 3 *Mass. Rep.* 130.

Consent by the parties that the suit shall not abate by the death of either of them, is obligatory, and will operate like a release of errors. *Darlington v. Chetson*, 1 *Call's Rep.* 520.

Where the Court never had jurisdiction, it cannot be given by the consent of the parties, but where they once had, although the power may have been executed, jurisdiction may be restored by consent. *Brown v. Crow*, *Hard. Rep.* 448. *Begle v. Fitzhugh*, 2 *Wash. Rep.* 213.—AM. EN.

* Though not strictly within the province of a treatise upon evidence to note the course of proceeding to be adopted by counsel on the trial of a cause, yet it may be useful in practice to observe, that in general, the plaintiff's counsel opens his case and calls his witnesses, and the defendant's counsel having done the like for his client, the plaintiff's counsel replies and makes his observations on the whole case. But when the plaintiff's counsel thinks it necessary to call witnesses for the purpose of contradicting some new fact proved by the witnesses for the defendant, the defendant's counsel makes a second speech, confining his observations to the witnesses so called by the plaintiff, and the plaintiff's counsel afterwards makes a general reply. In cases where the defendant calls no witnesses, the plaintiff's counsel has no reply, unless in the case of the Attorney-General, or other counsel representing him, when prosecuting for the Crown. This is the general course: but if the affirmative be on the defendant, he may begin, and then his counsel has the general reply, as in the case of an ejectment by an heir at law, where the defendant admits the title and sets up a will, which the plaintiff attempts to impeach. *Goodtitle dem. Revett v. Braham*, 4 *T. Rep.* 497. So where a landlord having obtained a verdict in ejectment, on a forfeiture of a lease, the tenant brought a cross ejectment; the defendant admitting the lease, began by proving acts of forfeiture, and Mr. Justice LAWRENCE held his counsel to be entitled to the general reply. *Doc dem. Chamberlayne v. Lloyd*, *Heref. Sum. Ass.* 1811. And the like was ruled by Mr. J. Le Blanc in replevin, where the defendant did not plead the general issue, but took the affirmative on himself by pleading *liberum tenementum*. *Bulford v. Croke*, *Oxford Sum. Ass.* 1811. The Court of Common Pleas has laid it down as a general rule, that the defendant by putting in a rule for payment of money into Court, which it was the duty of the plaintiff to admit, shall not thereby entitle the plaintiff to reply. 2 *Thurst.* 267.

everyman does his duty to society, until the contrary is proved; (g) Ch. I.
and therefore in an information against Lord *Halifax*, for refus- On whom the
ing to deliver up the Rolls of the Auditor of the Exchequer, the proof lies.
Court required the prosecutor to prove the negative, viz. that he
did not deliver them up. And in a late case, (1) where an action
was brought against the East India Company for putting on
board the plaintiff's ship, a cask containing varnish of a com-
[1] Williams
v. East. Ind.
Co. 3 East.
192.

(g) Where a person is bound to do a certain act, the omission of which would be a culpable neglect of duty, the performance of it will be presumed, unless the contrary is proved. *Hatwell v. Root*, 19 Johns. Rep. 345.

When the law presumes the affirmative, the proof of the negative is thrown on the other side. *U. States v. Hayward*, 2 Gallis. Rep. 498.

As the law directs the Sheriff to give notice of the sale, it presumes that he has performed his duty; but this presumption may be rebutted. *Topper v. Taylor et al.* 6 Serg. & B. Rep. 174.

Every officer acting under the sanction of an oath, or in whom the government reposes a trust, shall be presumed to have done his duty, until the contrary be proved. *Hickman v. Boffman*, *Hardin's Rep.* 362.

An officer of the customs duly commissioned, and acting in the duties of his office, is presumed to have taken the regular oaths. *U. States v. Bachelder*, 2 Gallis. Rep. 15.

An exemplification of proceedings of a foreign Court, are presumed correct. *Woodbridge v. Austin*, 2 Tyl. Rep. 368.

If there is a want of sea worthiness in the vessel of a common carrier, he is liable, although the loss does not proceed from that cause; but if it appears, from the facts, that the loss may be attributed to inevitable accident, the *onus probandi* of unseaworthiness lies on the owner of the goods. *Bell v. Read*, 4 Binn. Rep. 127.

In an action on a covenant of warranty on lands, the burthen of the proof that plaintiff yielded to a title paramount to that of the warrantor, lies on the plaintiff. *Hamilton v. Cutts*, 4 Mass. Rep. 349.

On a capture and libel as prize, the *onus probandi* lies on the captors. *Miller v. The Revolution*, 2 Dull. Rep. 22.

The burthen of proof is always on those who take the affirmative in pleading. *Phelps et al. v. Hartwell, et al.* 1 Mass. Rep. 71. *Blaney v. Sargent*, *ibid* 335. *Buckminster et al. v. Perry*, 4 Do. 593. *Hubbard v. Hubbard exr.* 6 Do. 397.

In an indictment against the minister of the "United Baptist Society," for granting false certificates of membership, they will be presumed to be true, until the government proves them false. *Commonwealth v. Stow*, 1 Mass. Rep. 54.

Every judgment of a Court is presumed to be fair, until the contrary appears; and if obtained by collusion, the person alleging it ought to plead and prove it. *Lee exr. of Daniel v. Cooke*, 1 Wash. Rep. 308.

The circumstance that a writing, exhibited for probate as a last will, was written by the testator, is *prima facie* evidence that he was in his senses and able to make a will; so that the *onus probandi* to repel that presumption, lies on those who wish to impugn it. *Temple et al v. Temple*, 1 H. & Munf. 476.

Sanity is to be presumed, and the *onus probandi* lies on the party denying it. *Jackson ex. d. Van Dusen v. Van Dusen*, 5 Johns. Rep. 144.

But where derangement has been shewn, it is then incumbent on the other side to shew that the party who did the act, was sane at the very time it was performed. *ibid.* Et vide *Lee. of Hodge v. Fisher et al.* 1 Peters' Rep. 163.—AM. Ed.

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 On whom the the cask took fire and destroyed the ship; this exception to the
 proof lies. general rule was fully recognised, and the Court held that it was
 incumbent on the plaintiff to prove that the defendants did not
 give due notice, and that for this purpose he must call either the
 person who delivered, or him who received, the cask on board
 the ship, to prove what passed at the time. So where a wife,
 twelve months after her husband had gone abroad, married a
 second husband, and had children, no evidence being given
 that the husband was living at the time of the second marriage,
 the children were held to be legitimate,(1) though, according to
 the general rules of evidence, the presumption would be that the
 husband was then living.(2)

(1) *Rex v.*
Twining,
2 B. & A. 386.

(2) *Vide post,*
 [356.]
 The evidence
 must be con-
 fined to the
 issue.

Another rule is, that the evidence must be applied to the parti-
 cular fact in dispute; and therefore no evidence not relating to
 the issue, or in some manner connected with it, can be receiv-
 ed $\&(h)$ nor can the character of either party to a civil cause be

(A) Neither party shall give evidence of any matters which are not in issue, because
 the other party will have no opportunity of encountering it by opposing testimony.
Larnard v. Buffington, 3 *Mass. Rep.* 552, et vide *Langdon et al. v. Potter*, 11
Mass. Rep. 313.

In a question of boundary, depositions taken in the presence of both parties,
 though before any cause was pending, are admissible. *Les. of Montgomery v.*
Dickey, 2 *Yeates' Rep.* 212.

In an indictment for forcible entry, it was resolved, that title could not be given
 in evidence by the defendant to prevent restitution. *Respublica v. Shryber et al.*
 1 *Dall. Rep.* 68.

The answer of one co-defendant in Chancery, is evidence neither for nor against
 the other. *Grant v. Bissett*, 1 *Caines' Cas. in Er.* 112. Vide *Phoenix v. Day*,
 5 *Johns. Rep.* 412.

A case made between the assurers and the assured in an action on a policy of in-
 surance, will not be received in evidence in another suit in which the parties are
 different, though it relates to the same subject on policy. *Eiting et al. v. Scott et*
al. 2 *Johns. Rep.* 157.

In an action of trespass against several joint-defendants, if there is no evidence
 against some of them, they may be struck off the record, and admitted as witnesses
 for their co-defendants. *Brown et al. v. Howard*, 14 *Johns. Rep.* 119. Et vide,
Van Deusen et al. v. Van Slyck et ux. 15 *Do.* 223.

So in trespass *quare clauum fregit* against three joint trespassers, two were taken
 and the third returned not found; it was held, that the one who had not been ar-
 rested, was a competent witness for the other two defendants. *Stockham v. Jones*,
 10 *Johns. Rep.* 21.

A party in the same suit or indictment cannot be a witness for his co-defendant,
 until he has been acquitted or convicted; and whether the defendants plead jointly
 or separately makes no difference. *People v. Bill*, *ibid.* 95.

If the plaintiff in an action on a policy of insurance, deliver to a broker a paper to
 enable him to adjust a loss, this paper will not be evidence in a suit brought by one
 of the parties against the master of the vessel insured. *Deiafield v. Hand*, 3 *Johns.*
Rep. 310.

called in question, unless put in issue by the very proceeding itself, for every cause is to be decided on its own circumstances, Ch. I.
The evidence must be confined to the issue.

Where a privity is shewn between several defendants, the words or acts of any one of them, may be exhibited as proofs of the trespass. *Broughton v. Ward*, 1 Tyl. Rep. 137. Et vide *Commonwealth v. Eberle et al.* 3 Serg. & R. Rep. 9.

In an action for false representations of a merchant's credit and character, similar representations to other people by the defendant are evidence. *Rumery v. Lovell*, 1 Anth. N. P. Cas. 11. Et vide *Allison v. Matthieu*, 3 Johns. Rep. 235.

Testimony arising after the commencement of the action, is admissible to explain facts occurring before its commencement. *McLeod v. Johnson*, 1 Anth. N. P. 16.

In an action brought against a surviving partner, upon a promissory note alleged to have been signed by the deceased partner in his life time, in the name of the firm, proof of his confessions of having signed it, are admissible. *Adams v. Brownson*, 1 Tyl. Rep. 452.

In an action of deceit, in a nature of a conspiracy, the acts or declaration of an alleged *particeps* in the fraud cannot be admitted in evidence to the jury, until a privity between him and the defendant is shewn to the Court. But when proved, the most liberal latitude will be allowed in shewing the conduct and confessions of the *particeps*. *Windover et al. v. Robbins*, 2 Tyl. Rep. 1.

Seisin of the land, or a mere naked claim to the crops standing on the *terra in qua*, the assault was committed, cannot be given in evidence under the general issue in mitigation of damages, in an action of assault and battery. *Wright v. Stephanus et al.* 2 Do. 80.

In an action of *trespass quare clausum fregit* against two, the levy of an execution upon a judgment rendered against one of the defendants who had quitted possession before, and never intermeddled with it since the levy, cannot be given in evidence against the other, who was in adverse possession at the date of the levy, and has not surrendered his possession since. *Bowne et al. v. Graham et al. ibid.* 411.

In an action of debt on bond, the defendant cannot give in evidence any thing which would be the ground of a different cause of action. *Williams v. Halsey*, 1 Root's Rep. 418.

Where there are strong circumstances to suspect a note has been fraudulently altered, general corroborating circumstances may be admitted in evidence to strengthen such suspicion; as that other notes drawn and endorsed by the same parties, (to take up one of which the note in question was given,) had been altered. *Rankin v. Blackwell*, 2 Johns. Cas. 198.

A deed is not evidence, unless it is first shewn that the grantor possesses some interest, either in law or equity, in the matter in controversy. *Faulkner v. Eddy*, 1 Bin. Rep. 138. *Les. of Peters et al. v. Condron*, 2 Serg. & R. Rep. 24. *Contra, Les. of Bioren v. Keep*, 1 Yeates' Rep. 440.

A deed proved to be executed by several of the grantors, though not by all of them, and not recorded, was ruled to be admissible in evidence. *Les. of Brown v. Long*, 1 Yeates' Rep. 162.

In an action against a common carrier by water, to recover damages for the loss of the plaintiff's goods, where the defence is, that carriers by water are, by the custom of the country answerable for such losses only as are occasioned by their own negligence, the defendant cannot give in evidence, that in a case in which the plaintiff had carried the property of others, he had refused to make compensation for a loss. *Dean v. Swoop*, 2 Binn. Rep. 72.

Declarations of a party are evidence against him, though made after the commencement of the suit. *Morris's Les. v. Vanderen*, 1 Dall. Rep. 65.

So the declarations of a person under whom a party to a suit claims, are evidence against him. *Basler v. Nisely*, 2 Serg. & R. Rep. 354.

Ch. I. and not to be prejudiced by any matter foreign to it.(1) (i)
 The evidence Therefore, in an ejectment by the heir at law, to set aside a will
 must be con- confined to the for fraud and imposition committed by the defendant, he shall
 fined to the not be permitted to call evidence to prove his general good cha-
 issue. racter :(2) but in a similar case before Lord KENYON at *Guild-*
 (1) Vide post, *hall*.(3) where the surviving subscribing witness was called to
 [195,] et seq.

(2) Goodright In covenant on a lease, the declarations of the lessor, in whose name the suit is
 dem. *Faro v.* brought, for the use of another, may be given in evidence by the lessee. *Johnson v.*
Hicks, Winton Sum. Assis. *Kerr*, 1 *Serg. & R. Rep.* 25.

1789, But declarations by one of several devisees in a will, are not evidence to invalu-
 cor. Buller. date it, on the issue of *devisee vel non*. *Miller et al. v. Miller*, 3 *Serg. & R. Rep.*
 J. B. N. P. 267. *Bovard v. Wallace*, 4 *Do.* 499.

In an action on a bond against principal and surety, the confession of the principal
 may be given in evidence. *Simonson v. Boucher*, C. C. Jan. 1811, *M. S. Rep.*

(3) Doe dem. The acknowledgment by a known partner of the existence of a partnership, can-
 Stephenson v. not be given in evidence against another charged as a dormant partner. *Corp v.*
 Walker, 4. *Robinson*, C. C. Oct. 1809, *M. S. Rep.*
 Esp. Cas. 50.

Declarations by members of what passed at a meeting of a corporation are not
 evidence against it. *Magill v. Kauffman*, 4 *Serg. & R. Rep.* 321.

Where one guarantees the performance of a contract to be made by another, the
 declarations of the latter, as to acts done within the scope of his authority, are evi-
 dence, though not conclusive, to charge the former. *Meade v. M. Dowell*, 5 *Binn.*
Rep. 195.—*Am. Ed.*

(i) In trespass for killing a dog, the plaintiff, to increase damages, gave evidence of
 the qualities and value of the dog; and it was held, that the defendant in mitigation of
 them, under the general issue, might do the same. *Lenz v. Stroh*, 6 *Serg. & R.*
Rep. 34.

If the character of plaintiff or defendant is not impeached, evidence in favour of
 character is not admissible. *Ketland v. Bisset*, C. C. of Penn. Oct. 1804, *M. S.*
Rep.

In an action for a libel, with a plea of justification, the plaintiff may give evidence
 of his character before it is attacked by defendant. *Romayne v. Duane*, C. C. of
 Penn. April, 1814, *M. S. Rep.*

In *assumpsit* for money had and received, the defendant cannot give evidence of
 his general character, though he is incidentally charged by the evidence with com-
 mitting a particular fraud. *Nash v. Gilkeson*, 5 *Serg. & R. Rep.* 352.

And if such evidence is admitted, the error is not cured by the Court telling the
 jury, before the bill of exceptions is actually signed, that they ought to pay no re-
 gard to it. *ibid.*

In actions for *fort*, and particularly such as charge defendant with gross depravity,
 upon circumstances merely, evidence of good character and integrity, is admissible
 to repel the charge. *Ruan v. Perry*, 3 *Caines' Rep.* 120.

In an action for maliciously procuring the plaintiff to be arrested on a charge of
 larceny, the defendant cannot give evidence to shew that the plaintiff's character was
 suspicious, and that his house had been searched on former occasions. *Newman v.*
Carr, 2 *Starkie's Rep.* 69.

In an action charging the plaintiff with perjury, it is not competent for the defend-
 ant to give evidence that the plaintiff had constantly advanced atheistical opinions as
 the principles of his belief, in mitigation of damages. *Ross v. Lapham*, 14 *Mass.*
Rep. 275.

In a civil case, the plaintiff will not be permitted to shew any illegality in his own
 conduct, to maintain his action, nor shall the defendant in his defence allege his own
 wrong. *Churchill v. Suter*, 4 *Do.* 161.

impeach the will, on account of fraud in obtaining it, his Lordship permitted the devisee to call persons to the general good character of the two other subscribing witnesses who were dead. Ch. I.
The evidence must be confined to the issue.

In an action for criminal conversation, (1) the defendant may give in evidence particular facts of the wife's adultery with others, or her having had a bastard before marriage; because by bringing the action, her husband puts her general behaviour in issue, but he cannot prove any instance of her misconduct, subsequent to the act of adultery. (2) (k)

So in criminal cases where the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts, for it is impossible without it to prove the charge. Yet there is one case of that sort in which the prosecutor is not allowed to examine to any particular fact without giving previous notice of it to the defendant, and that is where a man is indicted for being a common barrator: and the reason is, because such indictments are commonly against attornies, whose

(1) *Roberts v. Malston*, per Willes C. J. Hereford, 1745, Bul. N. P. 296.

(2) *Elsam v. Faucet*, 1 Esp. Cas. N. P. 562.

In an action for a false representation of character, the defendant may give his own character in evidence. *Rumsey et al. v. Lovell*, *Auth. N. P. Cas.* 21. n. a.

In an action of defamation, the defendant cannot shew the plaintiff's general character in evidence in mitigation of damages. *Smith v. Shumway*, 2 Tyl. Rep. 74.

So where the plaintiff claimed a chattel under a conveyance alleged to be fraudulent, evidence of the character of the parties thereto was refused. *Woodruff v. Whittlesey*, *Kirb. Rep.* 60.

So in a *qui tam* action for an assault, evidence of defendant's character refused. *Thompson v. Church*, 1 Root's Rep. 312.

In an action for a breach of promise of marriage, the defendant may shew in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety and virtue, without any limitation as to time. *Johnston v. Caulkins*, 1 Johns. Cas. 116.

Quere, In an action for a libel, can the defendant give in evidence, under the general issue, the general character of the defendant in mitigation of damages. *Foot v. Tracy*, 1 Johns. Cas. 46.

The plaintiff may his rank and condition in life to aggravate the damages, and the defendant may to mitigate them. *Larned v. Buffington*, 3 Mass. Rep. 546.—AM. ED.

(k) In an action for seducing plaintiff's daughter, it was proved that she had connexion with a person before her acquaintance with defendant. Lord ELLENBOROUGH would not permit evidence of her general character for chastity, as no evidence of general bad character had been given, and held that the evidence must be confined to the specific charge by the defendant. *Bumfield v. Massey*, 1 Camp. Rep. 460. Et vide *Dodd v. Norris*, 3 Do. 519, and *Ligon v. Ford*, 5 Munf. Rep. 10.

In *Massachusetts*, it was decided, that in an action by a woman for a breach of promise of marriage, and for seduction, the defendant cannot give in evidence in mitigation of damages, the general bad character of the plaintiff as to chastity, which she acquired after the seduction. *Boynston v. Kellogg*, 3 Mass. Rep. 189.

Where character is in issue, evidence of public opinion is admissible. *Ibid.*

In *South Carolina*, it was held, that in an action of *crim. con.* the misconduct of the wife, before her seduction by the defendant, may be given in evidence. *Torre v. Summers*, 2 Nott & M'Cord's Rep. 267.—AM. ED.

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of parties.

Bul.N.P. 296.

profession it is to follow law suits; and it is difficult to draw the line between that and acting as a barrator; therefore it makes it necessary for him to know what particular facts are to be given in evidence, that he may be prepared to show that he was fairly employed in those cases, and acted in his profession.

But in other criminal cases the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so by first calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put to issue, but coming in collaterally.

The mode in which a defendant in a criminal prosecution is permitted to support his character, is by calling witnesses who have known him for a length of time, and who will say, on their oaths, that his general character has always been good. If a man be indicted for treason, for murder, or for theft, and a number of witnesses say that his general conduct and character has been that of a loyal, a humane, or an honest man, this evidence goes strongly to fortify the presumption of his innocence; and, in a case depending merely on doubtful circumstances, often produces considerable effect on the minds of a jury. But such evidence is only admitted in prosecutions which subject a man to corporal punishment, and not in actions or informations for penalties, though founded on the fraudulent conduct of the defendant.* (1)

Attor. General
v. Bowman,
cor. Eyre, C.
B. Cited 2
Bos. & Pul.
532, n. (a)

(1) In capital cases the defendant may give his general character in evidence, after which the prosecutor may disprove such testimony. *Commonwealth v. Hardy*, 2 *Mass. Rep.* 317.

Per PARSONS C. J.—General character may be given in evidence on behalf of defendant in all criminal prosecutions. *ibid.*

Such evidence is entitled to but little weight, unless the fact is dubious, and the testimony presumptive. *The State v. Wells*, 1 *Coxe's Rep.* 424.—AM. Ed.

* In the course of the proceedings on the bill of pains and penalties against the Queen (*Tues. Oct. 17.*) it appeared that a person of the name of *Vimercati*, had been employed by the Crown as an advocate, to assist in the conduct of the inquiry which was instituted at *Milan*, previous to the introduction of the bill; and that another person of the name of *Codazzi* had been employed as the professional agent of the then Princess. A witness of the name of *Omariti* was called on behalf of the Queen, for the purpose of proving that he, being the clerk of *Codazzi*, had been seduced by *Vimercati* to deliver certain papers belonging to the Princess, which had been deposited in the hands of *Codazzi*; and on the counsel proceeding to examine him as to a supposed conversation with *Vimercati*, it was objected to by the Solicitor General. It was afterwards argued at great length; 1st. That acts and declarations of an agent might be given in evidence, (as to this *vide post*, 20 [17;]) and 2dly. That there was in the present case evidence to shew that a conspiracy existed amongst the *Italian* witnesses, in which case it was contended that the act of any one of the conspirators, (which it was argued *Vimercati* was,) might be given in

The subject of proof being ascertained by the preceding rules, Ch. I.
 the next thing which must be attended to is, that the best evi- What is the
 dence the nature of the case will admit of be produced ; for if best evidence.
 it appear that better evidence might have been brought forward,
 the very circumstance of its being withheld, furnishes a suspi-
 cion that it would have prejudiced the party in whose power it
 is, had he produced it.(m) Thus, if a written contract be in ex-

evidence to affect the credit of the whole proceeding. When the argument was concluded, two questions were put to the Judges, to which was afterwards added a third ; and on *Thursday*, 19th Oct. the Lord Ch. Justice of the King's Bench, delivered the unanimous opinion of the Judges on the several points submitted to them.

1st. They held, that if in the trial of an indictment for any crime, evidence had been given upon the cross examination of witnesses examined in chief in support thereof, from which it appeared that *A. B.* not examined as a witness, had been employed by the party, preferring the indictment, as an agent, to procure and examine evidence and witnesses in support of the indictment; the party indicted could not be permitted to examine *C. D.* as a witness, to prove that *A. B.* had offered a bribe to *B. F.* in order to induce him to give testimony touching the matter in the indictment (*E. F.* not being a witness examined in support of the indictment, or examined before it was so proposed to examine *C. D.*)

2d. That if in the trial of an indictment for any crime, evidence had been given upon the cross examination of witnesses examined in chief in support thereof, from which it appeared that *A. B.* not examined as a witness, had been employed by the party preferring the indictment, as an agent to procure and to examine evidence and witnesses in support of the indictment ; the party indicted could not be permitted to examine *G. H.* as a witness, to prove that *A. B.* had offered him a bribe to induce him to bring to him papers belonging to the party indicted (*G. H.* not having been examined as a witness in support of the indictment.)

3d. That on the prosecution for a crime, the proof whereof was supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted and under trial, so that the conspiracy was to be given in evidence against him ; general evidence of the existence of the conspiracy charged might be received in the first instance, although it could not affect such defendant, unless brought home to him, or to an agent employed by him.

4th. That the same rule applied if a defendant sought by such general evidence in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence ; provided the proposed evidence were previously opened to the Court as in the case of a prosecution to be proved by conspiracy.

The questions put to the Judges being not only general in their nature, but supposing several different cases ; the Chief Justice felt himself under the necessity of giving the reasons of the Judges at considerable length. An abridgement of the result has been here attempted ; but the opinion as delivered will be found in the Appendix.

(m) The rule that the best evidence which the nature of the case admits of respecting titles to land, is inapplicable in *Virginia*. *Lyon J.* dissenting. *Lee v. Tapscott*, 2 *Wash. Rep.* 276.

See contra in *Pennsylvania*. *Penn's les. v. Hartman*, 2 *Dall. Rep.* 230.

The copy of a letter is not the best evidence. *U. States v. Mitchell*, *ibid* 357.

Nor a bill of lading not signed. *Wood v. Roach*, *ibid* 180.

The general rule in the text, however, is recognised in *Cooke v. Woodrow*, 5 *Cranch. Rep.* 13. Et vide *Germanstown v. Livingston*, 2 *Caines' Rep.* 106. *Mills v. Twist*, 8 *Johns. Rep.* 121. *Hills v. Colvin*, 14 *Do.* 182.

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best evidence.

istence and in the custody of the party, no parol testimony can be received of its contents; if a subscribing witness has attested the execution of a deed, he, and he alone, is competent to prove it; because no other person can be so fully acquainted with the circumstances of the case, as he who was present at the transaction. (n) But when the law requires the *best* evidence, it does

The meaning of this rule is, that if the best legal evidence cannot be procured, the next best *legal* evidence shall be admitted. Per YEATES J. *Gray v. Penlyard*, 2 *Serg. & R. Rep.* 34.

Where the age of a defendant had been written in a bible, it was held, that such memorandum was not the best evidence of his age, but that he might prove it by a person who swore from his recollection of the fact of his birth. *Hawkins v. Taylor*, 1 *M. Corb's Rep.* 164.

If the record of a foreign Court of Admiralty be read without objection at the time, it is too late to object to it after the argument has commenced. *Russel v. Un. Ins. Co. C. C.*, April, 1806, *M. S. Rep.*

Where it appears, that the contract on which the action was brought, was in writing, the plaintiff is bound to produce it. *Rogers v. Van Hoesen et al.*, 12 *Johns. Rep.* 221.

Where an instrument is stated only as an inducement, and is not the gist of the action, though a *sine qua non* of recovery; or where the party has no right to the possession of it, he may prove its loss, to let in secondary evidence. *Skilling v. Bolt*, 1 *Con. Rep.* 147.

Circumstantial evidence may be given to a jury, as presumptive evidence of a fact, which could not have happened, unless such fact had pre-existed. *Hopkins v. De Graffenreid*, 2 *Bay's Rep.* 190.

If evidence be offered in so vague and uncertain a manner, that it is impossible to know what it is intended to prove, it ought to be rejected. *Duncan v. Findlay*, 6 *Serg. & R. Rep.* 235.

It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher nature in existence and which may be had, shall not be admitted. *Commonwealth v. Kinson*, 4 *Mass. Rep.* 646.

The best evidence the nature of the case will admit, must be produced, unless that of an inferior nature be authorised by Statute. *Waterman v. Robinson*, 5 *Mass. Rep.* 303. *Bassett v. Marshall*, 9 *Do.* 312. *Taunton & S. Boston Turnp. Corp. v. Whiting*, 10 *Do.* 327.

Charges in an administration account for the payment of taxes by the administrator, cannot be proved by the testimony of witnesses, but by the receipt of the collector. *Hall v. Hall's adms.* 1 *Mass. Rep.* 101.—*Am. Ed.*

(n) The old rule in *Westminster Hall* was, that an instrument coming from the opposite side, after notice to produce it, proof from the party who called for it was not required; the very circumstance of its being with the other side, being *prima facie* evidence of due execution, and from its being in such custody, the probable ignorance, in the party noticing, of the names of the witnesses. *Rez v. Middlezoy*, 2 *Durnf. & East's Rep.* 41. But in *Gordon v. Secretan*, 8 *East. Rep.* 543, it was ruled that a party calling for a deed, must prove it in the same manner as if it had come out of his own possession; and the practice extends to unsealed as well as sealed instruments. *Wetherstone v. Edgington*, 2 *Camp. Rep.* 94.

A certificate of a public officer made evidence by an Act of Assembly, is admissible, though the officer certifies in addition, to extraneous matter, not evidence. *Johnson v. Hocker*, 1 *Dall. Rep.* 406.

not require *all* the evidence which might be given; if there are two subscribing witnesses to a deed, or a dozen present at the making of a verbal contract, the evidence of any one, while uncontradicted, is sufficient; for the circumstance of the others

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Quere. Whether the certificate by the *accountant* of the Navy Department, under the seal of that department, is evidence. *Murray v. Wilson*, 1 Binn. Rep. 531.

A prothonary's entries upon the record, of the acknowledgment in open Court of a deed to himself, by the Sheriff, and his certificate of that acknowledgment, are evidence for him in an ejectment for the land. *Rickets v. Henderson*, 6 Binn. Rep. 133.

A genealogical table, certified under the seal of a foreign public officer, is not evidence. *Les. of Baurt v. Day*, C. C. April, 1814, *M. S. Rep.*

A report of surveyors of a vessel is not evidence of the facts stated in it, but only that a survey took place. *Watson et al. v. Ins. Co. N. A. C. C. April*, 1808, *M. S. Rep.* *Coit v. Del. Ins. Co. ibid.* Oct. 1809.

But the deposition of surveyors, referring to their report, as to the condition of the vessel, makes it evidence. *U. States v. Mitchell*, *ibid.* Jan. 1811.

In the Admiralty, the record of a warrant and survey of a vessel, is evidence to prove a want of sea-worthiness, in an action by the insured against the underwriter. *Brown v. Girard, & Yeates' Rep.* 115.

Quere. Whether the register of a vessel be *prima facie* evidence, that she belongs to a citizen of the U. States. *Dederer v. Del. Ins. Co. C. C. April*, 1807, *M. S. Rep.*

An entry of an appointment by the Governor, in the register kept by the Secretary of the Commonwealth, is good evidence of such appointment, it being proved that it never had been the custom to record *commissions* at length. *Moore v. Houston*, 3 Serg. & R. Rep. 185.

The proceedings of a Presbytery, are evidence of a suspension or discharge of a minister, but not of particular facts alleged. *Riddle v. Stephens*, 2 Serg. & R. Rep. 637.

The certificate of the Secretary of State, is good evidence to prove that a foreign minister was received by the government. *U. States v. Little*, C. C. Oct. 1808, *M. S. Rep.*

The general rule is, that payments made to any other person than the plaintiff in the suit, must be proved by the oath of a witness. *Cluggage v. Swan*, 4 Binn. Rep. 150. *Cutbush v. Gilbert*, 4 Serg. & R. Rep. 556.

The list, commonly called the list of *first purchasers*, was admitted in evidence to prove a grant by William Penn, the deed of which was alleged to be lost. *Hurst v. Dipbo*, 1 Dall. Rep. 30.

So to shew a grant to the persons, under whom the plaintiff claimed, without proof of the loss of the deed. *Morris's les. v. Vanderen*, 1 Dall. Rep. 64.

A copy of a deed enrolled in the King's Bench, in England, proved before the Lord Mayor in London to be a true one, allowed to be given in evidence to the jury to support a title to lands in Pennsylvania. *Hyam's Les. v. Edwards*, 1 Dall. Rep. 1.

In an action for the price of goods bought of a third person, and not of the plaintiff it is not competent for the clerk to prove that he made an entry of the sale in his books; the books themselves must be produced. *Keely v. Ord et al.* 1 Dall. Rep. 310.

If the signature to a promissory note be not in the hand writing of the drawer, but in that of a third person, who had been requested by the drawer to sign it for him, such third person must be produced; proof of the hand writing is not sufficient. *McKee v. Myer's exs.* *Addis. Rep.* 32.

Ch. I. not being produced, does not incline the mind to suspect that What is the best evidence. they would not have sworn the same; as the other party might

Where disbursements are proved to have been made by a factor for his principal, but in consequence of a loss of his papers, the factor is unable to prove the amount, the jury may make a reasonable allowance for the disbursements. *Sulger v. Dennis*, 2 Binn. Rep. 430.

A declaration by a vendor evincing a disposition to defraud, is not evidence against him in a subsequent and distinct transaction with another person, not then in contemplation. *Share v. Anderson*, 7 Serg. & R. Rep. 43.

The testimony of a witness, that he had notice of the dissolution of a partnership, cannot be given in evidence in a suit between others, in which the dissolution of the partnership at that time becomes a material question. *Shaffer v. Snyder*, 7 Serg. & R. Rep. 503.

The power of an agent to sell lands, must be in writing, and proved by indifferent witnesses. *Nicholson's les. v. Mifflin*, 2 Dall. Rep. 246. *S. C. 2 Yeates' Rep. 33. S. P. Meredith's les. v. Macoss*, 1 Yeates' Rep. 200. *Girard's Les. v. Krebbs et al.* cited 2 Yeates' Rep. 38. *Les. of Plumsted v. Rudebagh*, 1 Do. 502.

In *Massachusetts*, it has been decided, that the agency of a person who received his appointment in writing, cannot be proved by the testimony of the agent, unless it be lost or destroyed. Per *Sedgewick J. The Proprietors of Kennebeck Purchase v. Call*, 1 Mass. Rep. 483.

The testimony of a person to whose care a paper has been entrusted, that he had made search and could not find it, is evidence of its loss. *Jones et al. v. Fales*, 5 Mass. Rep. 101.

Facts which have become matter of record, if the record be lost or destroyed, may after proof of the existence and loss of the record, be proved by secondary evidence. *The Inhab. of Stockbridge v. The Inhab. of West Stockbridge*, 12 Do. 400.

Thus the incorporation of a town may be proved by parol evidence, if the act of incorporation be lost or destroyed. *ibid. Dillingham v. Snow, et al.* 5 Do. 547.

If the deponent is in Court, his deposition cannot be read. *Doe ex d. Sergeant v. Adams*, 1 Tyl. Rep. 197.

A deposition illegally taken, cannot be read after deponents decease, upon the principle that it is the best evidence which can be produced. *Johnson v. Clark*, *ibid.* 449.

The deposition of a former town clerk, may be admitted to shew his general mode of transacting his official business. *Taylor v. Holcomb*, 2 Tyl. Rep. 344.

Parol evidence cannot be admitted to prove that which, if it exist, ought to appear on record. *Franklin et al. v. Brownson*, 2 Tyl. Rep. 103. *Pitts v. Clark*, 2 Root's Rep. 231.

A surrender of the principal into Court, can only be proved by the record. *Fitch v. Hall, Kirk. Rep.* 18.

In an action for giving the plaintiff a dose, in some toy, his mother was allowed to testify to his complaints next morning, and from the necessity of the case, what he said. *Goodwin v. Harrison*, 1 Root's Rep. 80.

Parol evidence of the contents of a libel is not evidence, unless it be lost, destroyed, or in the hands of the defendant. *Aspenwall v. Whitmore*, *ibid.* 408.

How far the copy of a deed is evidence, which is not directed by law to be enrolled. Vide *Carroll's les. v. Llewellyn*, 1 Har. & M'Hen. Rep. 162.

The copy of a will, with letters testamentary, under the hand and seal of the deputy commissary, was admitted in evidence, on proof that diligent search had been made for the original, and that the signature was in the hand writing of the deputy commissary. *Smith's les. v. Steele*, *ibid.* 419.

have called them, had he not known that the fact deposed by one was consistent with the truth.(o)

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There are two cases indeed in which our law requires at least two witnesses; viz. on indictments for *perjury* and for *treason*.(p) When more than one witness is required.

In old transactions, hearsay, where it is the best evidence the nature of the case will admit, will be admitted. *Clairborne v. Parrish*, 2 Wash. Rep. 146.

The Queen v. Museot, 10 Mod. 193.

In an account, it is not sufficient to charge balances of other accounts, without producing and proving them as alleged to have been settled, if they exist, unless the defendant acknowledged them to be just, and promised payment. *Lewis v. Bacon*, 3 Hen. & Munf. Rep. 89.

The book of the Judge of the Court of Probates, containing the record of the probate of a will, may be given in evidence in ejectment, if it be proved that the original will was lost. *Jackson ex. d. Donaldson v. Lucett*, 2 Caines' Rep. 363.

The confession of the plaintiff that the timber was taken by a bailiff under an attachment, is not sufficient evidence of the attachment, but the record itself ought to be produced. *Jenner v. Jekiffe*, 6 Johns. Rep. 9.

The Court refused to receive parol evidence of the contents of a *certiorari*; the original or a sworn copy must be produced. *Brush v. Taggart*, 7 Johns. Rep. 19. Et vide *Foster v. Trull*, 12 Johns. Rep. 456.

In an action of trespass for entering plaintiff's office and taking a bill of lading, &c. evidence may be given of the contents, &c. of such bill, without notice. *S. P. Jackson ex. d. Livingston v. Kisselbrack*, 10 Do. 336.

Parol evidence of a disclaimer of title to real property, is not admissible. *Jackson ex. d. Van Allen et al. v. Vostburgh*, 7 Johns. Rep. 186. *Brant v. Livermore*, 10 Do. 358.

Where a note is given to settle an account, the plaintiff cannot give in evidence the account, nor can he give parol evidence of the contents of the note, unless he clearly shews that the note has been lost or destroyed. *Angel v. Felton*, 8 Johns. Rep. 140.

It is competent for a defendant in ejectment to prove that a person claiming as patentee, although of the same name, was not the patentee intended by the grant. *Jackson ex. d. Shultz et al. v. Goes*, 13 Johns. Rep. 518.

How far want of intention to violate a penal Statute is admissible in bar of the penalty. *Sturges v. Maitland*, Anth. N. P. 153.—Am. Ed.

(o) A party has a right to call as many witnesses as he thinks necessary to make out his case; and the Court will not interfere, unless there is proof of oppression.—*De Benneville v. De Benneville*, 1 Binn. Rep. 46. *S. C. 3 Yeates' Rep. 558.*—Am. Ed.

(p) The Constitution of the United States directs, that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court." Art. 3. sec. 3. Vide Act of 30th April, 1790, 2 L. U. S. 92.

Under the Act of Assembly of Pennsylvania, on an indictment for treason, the defendant's confession proved by two witnesses, is not sufficient to convict him. But a confession is good by way of corroboration. Therefore, where a defendant was proved guilty of one overt act, it was held, that his confession might be produced to substantiate another species of treason. *Commonwealth v. Roberts*, 1 Dall. Rep. 39. *Commonwealth v. M' Carty*, 2 Dall. Rep. 86.

On an indictment for perjury, two witnesses are not necessary to disprove the fact sworn by the defendant, but where there is but one witness, some other evidence ought to be adduced. *State v. Hayward*, 1 Nott & M'Cord's Rep. 549.—Am. Ed.

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When more than one witness is required.

Vide 4 Black. Com. 357.

7 & 8 W. 3, c. 3, s. 2.

Sect. 4.

1 Edw. 6, c. 12, s. 22.
5 & 6 Edw. 6, c. 11, s. 12.

1 & 2 Phil. & Mary, c. 10, s. 12;
same year, c. 11, s. 3.
Gahagan's case, 1 Leach. Crown Law, 50.
39 & 40 G. 3, c. 93.

In the case of perjury the reason is obvious, for if only one witness were to be called to contradict the oath of the defendant, there would be oath against oath, and both being equally entitled, to credit, the jury could not conclude that the defendant had sworn falsely. A reason something like this has been assigned for requiring two witnesses in treason; for it has been said that there is the accused's oath of allegiance to counterpoise the information of a single witness: but the true reason which induced the Legislature to require two witnesses in such cases, undoubtedly was, a due regard to the lives and liberties of men; which in heated and intemperate times, would be much more liable to danger from pretended plots and conspiracies, if one witness was permitted to convict them of such offences; and therefore the Statute of 7. & 8. W. 3. enacts, that no person shall be tried, or attainted of such treason as induce corruption of blood, or of mis-prison of such treason, but by the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other of them to another overt act of the same treason, unless the party indicted and tried shall willingly and in open Court confess the same, or shall stand mute or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury: and by another section it is enacted, that if two or more *distinct* treasons of *divers kinds* are alleged in one indictment, one witness produced to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed to be two witnesses to the same treason within the meaning of the Act. This Act was little more than a re-enactment of the provisions of two former Statutes; though it may be proper to observe, that petit treason is particularly mentioned in the first of them, and therefore two witnesses are still required to prove that offence, and every other species of treason, unless where the general provisions of these Statutes have been restrained by other Statutes. This has been done in the cases of treason concerning the current coin or counterfeiting the King's signet, privy seal, and great seal or sign manual, or bringing counterfeit coin into the realm, or for any offence by impairing, counterfeiting, or forging the current coin, which has been held to extend to all offences touching impairing the coin, which should afterwards be made treason. And by a late Statute made for the immediate protection of the late King's life, it is enacted, that in all cases of high treason, when the overt act alleged in the indictment, is the assassination of the King, or any direct

attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial and upon the like evidence as if he stood charged with murder.

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When more than one witness is required.

The law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath :* It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties ;(q) and, therefore, in cases depending on parol evidence, the testimony of persons who are themselves consulant of the facts they relate, must in general be produced ;(r) for the relation of one who has no other knowledge of the subject than the information which he has received from others, is not a relation upon oath ; and, moreover, the party against

* In the Court of Chancery, a peer of the realm puts in his *answer upon honour*, but his *affidavits, answer to interrogatories, and examination as a witness*, must be on oath. *Meers v. Lord Stourton*, 1 P. Will. 146. See also *Lord Shaftesbury v. Lord Digby*, 3 Mod. 99 ; and if one who is sitting as Judge or jurymen happen to know a fact with which the other Judges or jurors are unacquainted, he is sworn and openly examined as to the fact, the same as any other witness, and equally liable to cross-examination. Vide 2 St. Tr. 309 ; 3 St. Tr. 141 ; 5 St. Tr. 98 ; Kel. 12.

Though the party has a right to insist on the examination of witnesses on oath, he may waive this right, and bind himself by their declarations. Thus, in an action for goods sold and delivered, the defendant having said, that he would pay the money, if A. would declare that he had delivered the goods ; the declaration of A. that he had delivered them, was held by Lord ELLENBOROUGH to be evidence against the defendant, after the death of A. *Daniel v. Pitt*, Sittings after Mich. Term, 1806. And in subsequent cases it has been holden that such declarations may be given in evidence even during the life time of the person making it. Vide *Williams v. Innes*, 1 Campb. 364, and other cases there cited, and the note post [149.]

(q) The jury cannot take out with them depositions unless by consent. *White v. Beshing*, 1 Yeates' Rep. 400. Et vide *Perine v. Van Note*, 1 South's Rep. 146. *Herrick v. Blair*, 1 Johns. Ch. Rep. 101. *Bedington v. Southat*, 4 Price's Ex. Rep. 232.—AM. ED.

(r) The law requires the sanction of an oath to all parol testimony. *Gray v. Goodrich*, 7 Johns. Rep. 95. Et vide *Overseers of Germantown v. Overseers of Livingston*, 2 Caines' Rep. 107. *Jackson ex. d. Watson v. Cris*, 11 Johns. Rep. 487. *Chairborne v. Parrish*, 2 Wash. Rep. 146. *Davis et al. v. Wood*, 1 Wheat. Rep. 6. *Philips v. Thompson et al.* 1 Johns. Ch. Rep. 140. *Woodard v. Paine et al.* 15 Johns. Rep. 493.

An opinion said to have been expressed by one of the devisees, is not admissible to prove the testator was insane. *Phelps v. Hartwell*, 1 Mass. Rep. 71.

The declarations of a supposed grantor in a deed, after its date, "that he never had made a deed," &c. cannot be given in evidence against the party claiming under it, after the grantor's death. *Bartlet v. Delprat et al.* 4 Mass. Rep. 702.

The deposition of the mother of a bastard child, taken *ex parte*, and before any suit was commenced, cannot be read in evidence, though the mother be dead. *M. Donald v. Select Men of Greenwich*, 1 Root's Rep. 154.

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whom such evidence should be permitted, would be precluded from his benefit of cross-examination. The few instances in which this general rule has been departed from, and in which *hearsay* evidence has been admitted, will be found, on examination, to be such as were, in their very nature, incapable of positive and direct proof. Of this kind are all those which can only depend on *reputation*. The excluding of hearsay evidence in questions of *pedigree* or *custom*, would prevent all testimony whatever; for the evidence of any living witness of what passed within the short time of his own memory, would often be insufficient in the former instance, and could never avail in the other, where the usage and understanding of ancient times must be proved to establish the right which is claimed. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who, from their situation, were likely to know the facts; and also the general reputation of the place or family most interested to preserve in memory the circumstances attending it. Any thing which shews such *reputation* is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases.(e)

Therefore, if a question arise as to the *legitimacy* of *A.* declarations of his father and mother deceased, as to whether they were married, and whether the party was born before or after marriage, are good evidence, but not to prove that the child born in wedlock is illegitimate for want of access (1) (f). So, to prove the *state of a family*, as who a man married, what children he had, whether legitimate or illegitimate, that *A.* died abroad, &c. declarations of deceased members of the family, whether connected by blood or by marriage, are admissible, but those of deceased neighbours or acquaintances are not so.(2) In these cases also, the recital in deeds,(3) the finding of a special ver-

(1) *Stevens v. Moss. Cowp.* 491. See this case more at large, c. 3, s. 4.

(2) *Vowles v. Young.* 13 Ves. Jun. 140. *Whitlock v. Baker, Ibid.* 511.

(3) *B. N. P.* 233. 294; 5.

The declarations of one co-obligor not sued with the defendant are not evidence. *Sheriff v. Forgue, ibid.* 502.

Where the defendant claimed under a corporation, the evidence of the clerk as to the declarations of the trustees is not legal. *Jackson ex. d. Donally v. Walsh, 3 Johns. Rep.* 226.

In a writ of *homine replegiando*, the confessions of the officers who seized the persons claimed as slaves, cannot be given in evidence against the party making the avowry. *Azu v. Eitlinger, 1 Anth. N. P. Cas.* 47.—AM. ED.

(e) When no act of incorporation can be found of a parish, which had existed more than forty years, the Court admitted proof of its incorporation by reputation. *Dillingham v. Snow et al.* 5 *Muss. Rep.* 547.—AM. ED.

(f) Vide *Bowles v. Bingham, 2 Munsf. Rep.* 442.—AM. ED.

dict between other members of the family, stating a pedigree, inscriptions on old gravestones, heralds books, entries in family bibles, the statement of a pedigree in a bill* in Chancery,(1) a

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* It has been supposed, (vide *Phillips's Law of Evidence*, 2d ed. 263, and 4th ed. 356,) that these cases have been overruled by the decision of the House of Lords, and the answers of the Judges in the Banbury Peerage case. In answer to a question put to the latter, they delivered their opinion, that a bill in equity, "*filed for the purpose of establishing the legitimacy of a particular person*, or depositions taken under it, cannot be received in evidence in the Courts below, on the trial of an action of ejectment against a party not claiming or deriving title under the plaintiff or defendant in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree." It should here be observed, that the bill in the case referred to them, itself showed that the legitimacy of the plaintiff was a matter of dispute, so that it was impossible to consider it as the admitted reputation of the family, that the party was legitimate. But in the case referred to in the text, the pedigree formed no part of the controversy, but was merely the statement of the party's situation to shew that he was in a condition to contend for the right which was disputed; and it must be observed, that in answer to the same question, which is general, "whether any bill in Chancery could be received in evidence in a Court of Law to prove any facts either alleged or denied in such bill," the Judges said, that "generally speaking, a bill in Chancery cannot be read in evidence in a Court of Law, to prove any fact either alleged or denied in such bill.(†) But whether any possible case might be put which would form an exception to such general rule; the Judges would not undertake to say." Vide 2 *Schw. N. P.* 684. And in the subsequent case of the Berkley Peerage, Mr. Justice LAWRENCE said, "it is reasonable only that such declarations should be received as have in their favour a presumption of being consistent with the truth. This presumption, must depend on circumstances; and if the relator has no interest to serve, or any object to answer, as may be the case, where declarations are made subsequent to the commencement of a suit; and if there is no ground for supposing that the relator's mind had any bias, it is not unreasonable to conclude that he has not exceeded or stopped short of the limits of truth. In such a case, the admission of their declarations, though without the sanction of an oath, and without any opportunity of cross examination, may be attended with less inconvenience than would follow from a total rejection of the evidence; but where a dispute or doubt exists, and members of the family are produced, and even examined on oath, as witnesses in a cause; such a proceeding destroys all the weight and credit which is due to an unbiassed declaration, and is not admissible against a person who was no party to the suit, much less would any verbal declaration or written memorandum, made under such a bias, be admissible. Vide 2 *Schw.* 684. On the same principle, where the owner of a particular farm was called upon to repair a road, Mr. J. DAMPIER refused to admit an award made many years before, as evidence of his liability; for the accounts which deceased witnesses might have given to the arbitrator could not have been received, as being made *post litem motam*; and if they were not admissible, his opinion, founded on such testimony, could be entitled to no greater degree of weight. But, on the contrary, where depositions taken on one custom of a manor, incidentally mentioned another; they were considered admissible, even as declarations, because there was no dispute respecting the custom they were to support. *Freeman v. Phillips*, post. [64]

(1) Taylor v.
Cole, 7 T. R.
3, n. (a)

(†) The ancient rule was, that the allegations of a bill in Chancery was evidence against the complainant, the modern rule is different. *Niblick v. Hazebrig's exs.* 1 *Marsh. Rep.* 93.—AM. ED.

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(1) Doe d.
Johnson v.
E. 1 Pombroke, 11
East, 503.

paper writing purporting to be an old will in a cancelled state, which never appeared to have been acted upon, but which was found amongst the title deeds of a former possessor of the estate, (1) or the like, are good evidence.(u) But where there is

§ (u) Evidence of hearsay was permitted to be given to prove pedigree. *Strickland's les. v. Poole*, 1 *Dall. Rep.* 14. *Douglas v. Sanderson*, 1 *Yeates' Rep.* 15. *S. C.* 2 *Dall. Rep.* 116.

Evidence of hearsay from the father and mother, is not admissible in a question of age. *Les. of Albertson v. Robeson*, 1 *Dall. Rep.* 9.

What has been said by a deceased person, in relation to a boundary, is evidence. *Caufman v. Congregation of Cedar Spring*, 6 *Binn.* 59

And such evidence is admissible, although an implication follows from it that a survey was made. *Hamilton v. Minor*, 2 *Serg. & R. Rep.* 70.

The rule of *post litem motam*, it seems, in respect to declarations in relation to pedigree, has not been recognised in the U. States. *Baudreau v. Montgomery*, C. C. Nov. 1821. *M. S. Rep.*

An *ex parte* affidavit made abroad, may be admitted to prove pedigree; and the identity of a person, so far as respects marriage, but not to establish an independent fact. *Fogler's les. v. Simpson*, 1787, cited 2 *Dall. Rep.* 117. 1 *Yeates' Rep.* 17. *Winder v. Little*, 1 *Yeates' Rep.* 152. *Les. of Lilly v. Kintzmilller*, 1 *Yeates' Rep.* 28.

But it seems an *ex parte* affidavit made in another State, would not be admitted to prove pedigree. *Douglas's les. v. Sanderson*, 2 *Dall. Rep.* 118.

Depositions of deceased witnesses, whether in or out of the State, in a case between other parties, may be admitted to prove pedigree, and that whether made after, or before the question of pedigree, had become a subject of controversy. *Bordereau v. Montgomery*, C. C. Nov. 1821, *M. S.*

Ex parte depositions are not admissible to establish an independent title, but may be read in evidence of boundary, or by way of corroboration of other testimony. *Sturgeon v. Waugh*, 2 *Yeates' Rep.* 476. *Les. of Lilly v. Kintzmilller*, 1 *Yeates' Rep.* 28.

Evidence by hearsay, and general reputation, is sufficient as to pedigree. *Jackson ex. d. Ross et al. v. Cooley*, 8 *Johns. Rep.* 99. But not to establish the freedom of an ancestor. *Davis et al. v. Wood*, 1 *Wheat. Rep.* 6.

Hearsay evidence is incompetent to establish any specific fact, which is in its nature susceptible of being proved by witnesses, who speak from their own knowledge. *Mima Queen and child v. Hepburn*, 7 *Cranch's Rep.* 390. *Davis v. Wood*, 1 *Wheat. Rep.* 8.

That hearsay evidence supposes some better evidence which might be adduced, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds that might be practised under its cover, combine to support the rule of its inadmissibility. *ibid.*

There are some exceptions to this rule, viz. cases of pedigree, of prescription, of custom, and in some instances of boundary. *ibid.* 390.

The circumstance that the eye witnesses to a specific fact are dead, will not justify the admission of hearsay evidence to prove that fact. *ibid.*

Reputed boundaries are often proved by the testimony of aged witnesses, and the hearsay evidence of such witnesses, has been admitted to establish such lines in opposition to the calls of an ancient patent. *Corn et al. v. Penn et al.* 1 *Peters' Rep.* 496.

Though hearsay and reputation may be received as evidence to prove pedigree, yet where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what

no question about the parents of a person, but merely as to the place of his birth, (1) the declarations of his parents or others as to that fact, are not admissible. (x)

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In questions about a *right of way* also, reputation has been received ; (2) and to prove a piece of land *parcel of an estate*, de-

(1) R. v. Inhabitants of Erith, 3 East, 539.

(2) B. N. P. 295.

they have heard and understood ; such evidence is insufficient for that purpose. *Jackson ex. d. Garland v. Browner*, 18 Johns. Rep. 37.

A register of births and marriages kept in the records of a town, is evidence of pedigree and heirship. *Jackson ex. d. Miner v. Bonham*, 15 Johns. Rep. 226.

Hearsay is admissible as evidence of the death of a person, *ibid.*

Recitals in a conveyance are evidence of pedigree. *Les. of Paxton v. Price*, 1 Yeates' Rep. 500. *Morris's les. v. Vanderen*, 1 Dall. Rep. 67.

Depositions of ancient persons admissible to prove pedigree. *Jenkins v. Tim et al.* 1 Wash. Rep. 128.

Hearsay evidence admissible to prove ancestors to have been *Indians*, *ibid.*

Hearsay evidence may be received to prove relationship, when it comes from a deceased relative, and made under circumstances to preclude a suspicion of bias. *Chapman v. Chapman*, 2 Cen. Rep. 347. Et vide *Bustler v. Haskell*, 4 Eq. Rep. 651.

So when it was derived from a person who was then heir at law. *Pancoast's les. v. Addison*, 1 Hur. & Johns. Rep. 357.

An entry respecting the age of a child, in a book called a family bible, in the hand writing of the brother of the child, and supported by his oath, that by the direction of his deceased father, he copied that, and other entries respecting the ages of the family, from another book in which the original entries were made in his father's hand writing, without accounting for the non-production of that book, is not evidence. *Curtis et al. v. Patten et al.* 6 Serg. & R. Rep. 135.

Legitimacy of a child presumed on slight proof, after the lapse of thirty years, and the death of father and child. *Johnson v. Johnson*, 1 Eq. Rep. 595.

Death of a person out of the State may be proved by reputation among his relations. *Ewing v. Savary*, 3 Bibb. Rep. 236.

Common reputation is traditional evidence, to prove two persons to be brothers of the whole blood, if better evidence cannot be produced. *Johnson v. Howard*, 1 Har. & M'Hen. Rep. 231.

A special verdict or depositions taken in a case between different parties, is admissible, to prove pedigree ; but in case of depositions, the witnesses must be dead. *Boudreau v. Montgomery*, C. C. Nov. 1821, M. S. Rep. *Les. of Baurt v. Day*, C. C. April, 1821, M. S. Rep.

Vide *Pegram v. Isabell*, 2 Hen. & Munf. Rep. 193. *Lowell v. Arnold*, 2 Munf. Rep. 167.

An ancient account in the hand writing of the plaintiff's ancestor, found with the title papers, cannot be received in evidence, in support of the title. *Jackson v. Murray*, Ark. N. P. Cas. 76.

Though the general rule is, that hearsay evidence is inadmissible, yet to this rule there are some exceptions, such as in the case of *pedigree and old transactions*, where it is the best evidence the nature of the case will admit. *Clairborne v. Parrish*, 2 Wash. Rep. 146.—AM. ED.

(x) *Shearer et al. v. Clay*, 1 Lit. Rep. 200. Sed vide *Jackson ex. d. Miner v. Bonham*, 15 Johns. Rep. 226.—AM. ED.

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- (1) *Davis v. Pearce*, 2 T. R. 53. declarations made by a deceased tenant, at the time he was possessed, of whom he held, may be given in evidence.(1)(y) So entries by a steward, since deceased, of money received by him of different persons in satisfaction for trespasses committed on the waste,(2) or by deceased officers of a township of the receipt of money from the officers of another township, for a proportion of the church rates,(3) have been deemed admissible evidence to prove that the right to the soil in the one case, and the liability of the township paying to repair in the other; for in these cases the entry was made at a time when no dispute existed, by persons who thereby charged themselves with money, and were in fact acting against their own interest. So an entry made by parish officers that a particular pew was repaired by an individual as belonging to his house, has been held to be evidence for a future occupier of the house to prove his right to the pew.(4) Even declarations of deceased parishioners at a time when no dispute existed as to the boundaries of a parish,(5) have been received in evidence; and in one case, the Court of Exchequer received the declarations of deceased parishioners as to a general *modus* throughout the parish (though the relator held land),(6) but this case stands by itself, and seems rather contrary to the general principle, which requires that the party should have no interest when he makes the declaration. In the case of tithes, where a particular *modus* is set up, the entries of a former incumbent or his collector have been in several instances admitted;(7) for having no interest beyond his own incumbency, he cannot be supposed to have made false entries for the mere purpose of furnishing evidence for his successors. This last authority was recognised by Lord Kenyon; but his Lordship said, that the case of an incumbent was always considered as an excepted case; and therefore entries made in a book by the owner of land, of money paid him by a particular tenant,(8)
- (2) *Barry v. Bebbington*, 4 T. R. 514.
- (3) *Doe d. Webber v. Ld. G. Thynne*, 10 East, 206.
- (4) *Stead v. Heaton*, 4 T. R. 669.
- (5) *Prioe v. Littlewood*, 3 Campb. 288.
- (6) *Rex v. Inhabitants of Hammer-smith*, Appendix.
- (7) *Harwood v. Sim. Wightw.* 112.
- (8) *Legrosse v. Levemore*, 2 Gwill. 527; *Ld. Arundell's case*, 12 Vin. 255, per *Ld. Hardw.* 2 Ves. 43.
- (9) *Outram v. Morewood*, 5 T. R. 121.

(y) In an action of ejectment, it was held, that the declarations of a person in possession under the lessee, was *prima facie* evidence of the fact of underletting. *Andrews's les. v. Fleming*, 2 Dall. Rep. 93.

Vide *Doe ex d. Hindly v. Rickarby*, 5 Esp. Rep. 4.

Declarations by the tenants or occupiers of land, are admissible no farther than as they relate to the tenancy or possession; they are not evidence in respect of the title, except as the declarations of a person claiming land, or through whom it is claimed, against his interest. *Jackson ex d. Young v. Vredenburg*, 1 Johns. Rep. 159. *Warning v. Warren*, ib. 340. *Jackson ex d. Griewold v. Bard*, 4 Do. 230. *Jackson ex d. Burr et al. v. Shearman*, 6 Do. 19. *Bartlet v. Delprat et al.* 4 Mass. Rep. 702. *Jackson ex d. M'Donald v. M'Call*, 10 Johns. Rep. 377. *Nichols v. Hotchkiss*, 2 Day's Rep. 127.—AM. Ed.

were held to be no evidence after his death to prove his property in the land.(7)

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But in a subsequent case,(1) where the book of the lessee of an impropriate Rectory was offered as evidence, to show that he had been in the receipt of a certain description of tithe claimed by the vicar, the Court of Exchequer admitted such book, notwithstanding the decision in the above case, and the observation of Lord Kenyon was strongly impressed upon them; and in a former case(2) it had been holden, that the entries of the steward of a former proprietor of the land, of payments made by him, were evidence for the present owner to prove a *modus*.(a)

(1) *Illingworth v. Leigh*, 4 Gwill. 1615.

(2) *Woodnoth v. Lord Cobham*, Bun. 180.

Here a distinction should be attended to between hearsay evidence of mere facts, and of *general reputation*. In cases of *pedigree*, declarations of deceased members of the family, as to the birth, marriage or death of any member of it, are admitted, for this is general reputation; but the place of birth being a particular fact, we have before seen that hearsay evidence respecting it was rejected. In cases of *custom* also, which can only be supported by a variety of facts and by long and uniform usage, the general reputation only can be proved by hearsay evidence, a witness may be permitted to state what he has heard from persons since deceased, respecting the reputation of the right; but not to state facts of the exercise of it which the deceased persons said they had seen.(3) Thus in a case(4) laid before Mr. Justice CHAMBERLAIN at *Shrewsbury*, where the question on the record was, whether a turnpike was erected within or out of the limits of the town of *Wem*; that learned Judge permitted the plaintiff, who contended that it was within the town, to give evidence of general reputation, that the town extended to a piece called the Townend Piece; and that old people, since deceased, said, that such was the boundary of the town; but he would not suffer it to be proved that those persons had said that there were formerly houses where none then stood, observing, that this was evidence of a particular fact and not of general reputation.(b)

(3) *Per Grove J. in R. v. Ellis*, 11, 3 T. R. 707.

(4) *Ireland v. Powell*, Salop Sp. Ass. 1820.

(7) Disapproved of by Wood B. in *Perigal v. Nicholson*, 1 *Wightw. Rep.* 63; and by PUGH B. in *Woodnoth v. Lord Cobham*, 2 *Gwill. Rep.* 653.—AM. Ed.

(a) The vicar's books are evidence, to shew that the money payments received in lieu of tithes, are founded on and regulated by a criterion not in existence beyond legal memory. *Walter v. Holman*, 4 *Price's Excheq. Rep.* 171.

(b) In *Connecticut*, hearsay evidence from interested persons as to the boundaries of the land, has been refused. *Porter v. Warner*, 2 *Root. Rep.* 22.

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See the several cases in the Appendix, No 1. particularly Doe d. Didsbury v. Thomas, 14 East, 323. Weeks v. Sparke, 1 M. & S. 679. Blackett v. Lowe, 2 M. & S. 494.

But though this has been established in cases of *pedigree* and *custom*, yet great difference of opinion formerly prevailed as to the admissibility of such evidence in questions of *prescription* or other rights merely private, some Judges being in the habit of receiving it when a foundation had been laid by other evidence, but giving little weight to it in their direction to the jury; others, on the contrary, totally rejecting it.(c) It seems now however to be clearly settled that such evidence is not admissible; and indeed the whole ground on which general repu-

But in *Maryland*, traditional evidence of what an ancestor of the plaintiff, who had been seised of the lands in question fifty years at that time, did say concerning those lands, was given in evidence. *Howell's les. v. Tilden et al.* 1 Har. & M'Hen. Rep. 84. Et vide *Redding's les. v. M' Cubbin*, *ibid.*, 368.

As to boundaries being proved by hearsay, vide *Howell's les. v. Tilden et al. ibid.* 84. *Redding's les. v. M' Cubbin*, *ibid.* 368. *Bladen's les. v. Cockey*, *ibid.* 230. *Long v. Pellett*, *ibid.* 531.

The same rule prevails in *North Carolina*. *Harris v. Powell*, 2 Hayw. Rep. 349. In *Pennsylvania*, *ex parte* depositions may be read in evidence of boundary. *Les. of Lilly v. Kintzmill*, 1 Yeates' Rep. 28. *Sturgeon v. Waugh*, 2 Do. 476.

A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them; but not as to strangers. *Lee v. Tapscott*, 2 Wash. Rep. 276.

In a question of boundary, depositions taken in the presence of both parties before any cause was pending, are admissible. *Les. of Montgomery v. Dickey*, 2 Yeates' Rep. 212.

The declarations of a person now dead, as to what he heard his father say respecting a corner, the father then being the owner of the land, are not admissible in favour of a person claiming under the father. *Smith v. Walker*, 1 Carolina Law Repos. 514.

The declarations of a deceased person who surveyed the land in question, as to the boundaries, are admissible. *Caufman v. Presb. Congr. of Cedar Spring*, 6 Binn. Rep. 59.

But the declarations of a deceased surveyor, that he had been authorised by the proprietaries of the State to survey land for A. under whom plaintiff's lessee claimed, are inadmissible to establish plaintiff's title, although the surveyor's official papers had been accidentally destroyed. *Bonnet's les. v. Devoebaugh et al.* 3 Binn. Rep. 175.

Reputed boundaries are often proved by the testimony of aged witnesses, and the hearsay evidence of such witnesses has been admitted to establish such lines in opposition to the calls of an ancient patent. *Conn et al. v. Penn et al.* 1 Peters' Rep. 406. *Smith v. Newells*, 2 Lit. Rep. 160.—AM. ED.

(c) A legal prescription cannot exist in *Pennsylvania*, but the doctrine of presumption prevails in many instances. *Young v. Collins*, 2 Browne's Rep. 293.

Where an easement had been enjoyed for sixty years and upwards, with every appearance of ownership, and with the apparent acquiescence of those seised of the inheritance, it was held that the jury ought to presume a grant. *Ibid.* 292.

In *Massachusetts*, in the case of *Rust v. Low et al.* 6 Mass. Rep. 90, it was decided, that the country had been settled long enough to allow of the time necessary to prove a prescription. Vide *Gayetty v. Bethune*, 14 Mass. Rep. 49.

Prescription will not, in any case, give a right to erect a building on another's land. *Cortelyou v. Van Brunt*, 2 Johns. Rep. 357.

Vide post as to presumption.—AM. ED.

tation is admitted supports this latter opinion. Reputation in its very nature can only be the common and general understanding of a number of persons: a whole family may have a common reputation concerning the birth, death, or relationship of any of its members. A whole township may have a common reputation concerning its boundaries, or the rights of its individual members, as members of the body; but there can be no general or common reputation as to the rights of an individual or the appurtenances of a particular estate. In this case, therefore, it becomes mere *hearsay* and not *general reputation*, and is inadmissible on the same principle as hearsay of particular facts in cases of public right. This distinction will not militate against those cases in which the entries of deceased persons, charging themselves with sums of money, were received as evidence; for they, as before observed, were not received merely as hearsay of a particular fact, but as declarations made by persons who, by the very act of making them, furnished evidence against themselves.

Indeed, in many other cases, the law receives the memorandum in writing, made at the time by a person since deceased, *in the ordinary way of his business*, and which is corroborated by other circumstances as evidence of the fact it records. (d) * And in

(d) A book of accounts in the hand writing of, and kept by a clerk who is since dead, is proper evidence, upon these facts being proved. *Lewis v. Norton*, 1 Wash. Rep. 76. Vide *Kennedy v. Fairman*, 1 Hayw. Rep. 458. *Fenno v. Rogers et al.* 1 Bay's Rep. 480.

An entry made by an administrator since dead, was, with other circumstances, permitted to be given in evidence. *Brown v. Brown*, 2 Wash. Rep. 151.

In *Mc Coul v. Le Kamp's admr.* 2 Wheat. Rep. 111, a witness swore, that the articles of merchandise in the account annexed to his deposition, were sold by plaintiff to defendant, and charged in the day book by the deponent and another person since dead, and that deponent delivered them, and referred to the original entries in the day book, held sufficient evidence of sale and delivery.

In a suit in Chancery, *between partners*, the partnership books are evidence, and vouchers are unnecessary. *Fletcher v. Pollard*, 2 H. & Munf. 544. *Brickhouse v. Hunter et al.* 4 De. 363.—Am. Ed.

* Where it appeared that the plaintiff's draymen (he being a brewer) were used to come every night to the clerk of the brewhouse, and give an account of the beer delivered out, which he set down in a book, and the draymen signed it; this, with proof of the drayman's hand writing, was held to be evidence of the delivery after his death. (*Lord Torrington's Case*, Salk. 285. *Pitman v. Maddox*, *ibid.* 690.) But in another case, where the plaintiff only proved the servant's hand writing, Lord Ch. J. RAYMOND held it insufficient, saying, that it differed from *Lord Torrington's Case*, because there the witness saw the draymen sign the book every night. (*Clerk v. Bedford*, Mich. 5 Geo. 2. B. N. P. 282.) It is observable that the Stat. 7. Jac. c. 12, enacts, that the shop book of a tradesman shall not be evidence after a year, whereas it is not at any time of itself evidence. Lord HARDWICKE (2 Ves. 43.)

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prosecutions for murder where the deceased, while in the declared apprehension of death, or in such imminent danger of it

observed, that at the time this Act of Parliament was made, there was an opinion growing up that after a certain length of time, a man's own shop books should be evidence for him after a year; to prevent which was that Act made, as he had been informed by Lord RAYMOND upon consulting him. It was to take away that opinion that after the year it might be evidence.

So an entry made by a banker's clerk, of his having paid a check, was not permitted to be read as evidence of such fact, though the clerk was resident in a foreign country. *Cooper v. Marsden*, Sittings after East. Term. 1793, M. S. 1 *Esp. N. P. Cas.* 1, S. C.

But in an action for a watch delivered to a watchmaker to be cleaned, the servant having sworn that he saw his master deliver it to a third person by the owner's orders, and such third person having sworn that he never received it, Lord KANTON permitted the master's day book, containing an entry made by himself at the time, in the ordinary course of business, to be read in confirmation of the servant's testimony. *Digby v. Stedman*, 1 *Esp. N. P. Cas.* 329.

Notice having been given to produce a letter of a particular date, and the party having acknowledged the receipt of it, but refusing to produce it, Lord ELLENBOROUGH permitted a copy made by a deceased clerk in a regular letter book, to be read as evidence of its contents. *Pritt v. Fairclough*, 3 *Camp.* 365.

Where an estate had been enjoyed many years under a recovery suffered by a remainder man, and no surrender of the life estate could be found, the entry in the attorney's bill book, made at the time, containing charges for drawing and engrossing the surrender (which bill had been paid) was, after the death of the attorney, received as evidence of the surrender. *Warren d. Webb v. Granville*, 2 *Str.* 1129. So where a man midwife made an entry in his book of having delivered a woman on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid; such entry was received in evidence upon an issue as to the age of the child at the time of his afterwards suffering a recovery. *Higham v. Ridgeway*, 10 *East*, 109. And in a very late case an attorney's book charging for engrossing and registering a lease on a particular day, which was after its date, was received as evidence to shew the exact day of its execution. *Doc d. Rees v. Robson*, 15 *East*, 32.

Upon an issue out of Chancery, to try whether eight parcels of *Hudson's Bay Stock*, bought in the name of Mr. Lake, were in trust for Sir Stephen Evans; his assignees (the plaintiffs) shewed first, that there was no entry in the books of Mr. Lake, relating to this transaction. Secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas, (Sir Stephen's book keeper, to the book B. B. of Sir Stephen Evans.) Thirdly, Jeremy Thomas was proved to be dead, and upon this the Court of King's Bench, on a trial at bar, admitted the book referred to, in which was an entry of payment of the money, not only as to the six, but likewise as to the other two, in the hands of Sir Biby Lake, the son of Mr. Lake, *Bul. N. P.* 282.

Another case, similar to the above, was *Smartle v. Williams*, where the question being whether mortgage money was really paid, a scrivener's book of accounts was after his death received as evidence of the payment. Vide *Bul. N. P.* 283. This case is reported in *Salk.* 245. 280, but the point is not there mentioned. It must be understood, that in this, as in the other cases, some circumstances were proved to lay a foundation for this book being received.†

† In *Connecticut*, in an action for a book debt, under the Statute, books of account are admitted in evidence. Vide *Swift's Syst. of Evid.* 81. *Bradley v. Goodyear*, 1 *Day. Rep.* 104. *Levenworth v. Phelps*, *Kirb. Rep.* 71.

as must necessarily have raised that apprehension in his mind, has made a relation of the manner in which the offence was committed, such relation has been received as evidence against the

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The books of account of a party in *New York*, (from the case, original books are intended) are not evidence in case of a single charge, nor where there are several charges, unless the party proves that he had no clerk, that some of the articles were delivered, and that the accounts are fair and honest. *Peabury v. Thayer*, 12 *Johns. Rep.* 461.

Woodcock's
case, Leach,
\$63.

In an action by an administrator for money lent, the book of account containing the original entries in the hand writing of the intestate, is not evidence for the plaintiff. *Case v. Potter*, 8 *Johns. Rep.* 211.

Entries made by one partner in the books of accounts during the partnership, are admissible against both. *Walden et al. v. Sherburne et al.* 15 *Johns. Rep.* 409.

An entry made by a clerk, of the protest of a promissory note, cannot be received in evidence, though such clerk be abroad. *Cummins v. Fisher*, 1 *Anth. N. P. Cas.* 2.

In *New Jersey*, it has been decided, that a book of accounts ought not to be received in evidence where no price is fixed to the items charged. 1 *South. Rep.* 370.

Charges of cash paid, advanced, or lent, written on one of the last leaves of a book, detached from the daily entries and accounts, by sundry intervening blank leaves, and dated during the time of such entries and accounts, are not evidence to go the jury. *Wilson v. Wilson*, 1 *Halst. Rep.* 95.

Quere, Whether books of accounts are evidence of cash lent. *ibid.*

In *Pennsylvania*, shop books proved by the oath of the plaintiff are admitted in evidence to charge the original debtor. *Pulteney et al. v. Ross*, 1 *Dall. Rep.* 239.

And where the action is brought by the assignees and the book is in their possession, parol evidence to prove the sale by the bankrupt will not be admitted, until the non-production of the book is accounted for. *Kelly v. Holdship*, 1 *Browne's Rep.* 36.

Where the book is in the hand writing of the clerk, they must be proved by him, or proof that he is dead or out of the power of the Court. *Sterret v. Bull*, 1 *Binn. Rep.* 234.

A day book is *prima facie* evidence of the prices, as well as the sale and delivery of goods. *Alister* of money lent or cash paid. *Ducoign v. Schreppel*, 1 *Yeates' Rep.* 247.

The law fixes no particular time at which the entry in a tradesman's books should be made; if at or near the time, it is sufficient. *Curren v. Crawford*, 4 *Serg. & R. Rep.* 5. Vide *Vance v. Fearnes*, 1 *Yeates' Rep.* 321, *S. C.* 2 *Dall. Rep.* 217.

A book kept by a forge master for the purpose of settling with his workmen, in which is entered their names, the quantity of iron delivered, the date, sometimes the price, such a book of original entries is evidence against the purchaser of the iron, although it contain the names of the purchasers. *Rogers v. Old*, 5 *Serg. & R. Rep.* 401.

A book of entries, in the form of a ledger, was allowed to be read, the Court leaving it to the jury to determine on the face of it, whether it was an original or a transcript, and in the latter case, directing them to pay no regard to it. *Rodman v. Hoop's exrs.* 1 *Dall. Rep.* 36.

The book of original entries, with the oath of the party, is the best evidence of goods sold and delivered or work done, and must be accounted for. *Kelly assignee of Gullen v. Holdship*, 1 *Browne's Rep.* 36.

A book, in which entries are transcribed from a slate, is not evidence. *Ogden v. Miller's exrs.* 1 *Browne's Rep.* 147.

The plaintiff's book of entries is not evidence to prove work done for the defendant by the servant of plaintiff. *Wright v. Sharp*, 1 *Browne's Rep.* 344.

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prisoner, though the person making it was not formally sworn ; for, as was observed by Lord C. B. EYRE in a case of this kind, "when the party is at the point of death, and when every hope

Ib. 567.

But it is good evidence to prove a sale and delivery of lime, and it is not necessary to produce the carters by whom it was delivered. *Curren v. Crawford*, 4 Serg. & R. Rep. 3.

Quere. Whether the books of a defendant are evidence to determine a collateral question, as that a third person was defendant's debtor. *Dubitatur. Miffin v. Bingham*, 1 Dall. Rep. 276.

An entry in defendant's daybook, that he had received goods to sell on commission was ruled to be inadmissible evidence in an action for the price of the goods *Baisch v. Hoff*, 1 Yeates' Rep. 198.

The daybook of an agent and consignee was ruled to be evidence to prove his disbursements in the outfit of a vessel in a foreign port, in an action against the owners of a vessel. *Seagrove v. Redmun et al.* 2 Yeates' Rep. 254. 4 Dall. Rep. 153.

Where in an action against *A.*, a partnership between *A.* and *B.* is sworn to by a clerk of one of the partners, the books of *B.* may be given in evidence, to fortify or discredit the testimony of the witness. *Moyes et al. v. Brumaux*, 3 Yeates' Rep. 30.

In an action for the price of goods, to prove that they were bought of a third person, and not the plaintiff, the clerk cannot prove that he made an entry of the sale in his books, but they must be produced. *Keely v. Ord et al.* 1 Dall. Rep. 310. Vide *Sterrett v. Bull*, 1 Binn. Rep. 234.

An entry made nineteen years before in the book of the defendant's testator, that a promissory note of twenty-three years' standing was paid, was read to support the presumption of payment. But this case was not considered as a precedent. *Rodman v. Hoop's exs.* 1 Dall. Rep. 35.

A book kept by an agent, and containing copies of invoices, is not evidence of the sale and delivery of goods. *Cooper v. Merrill*, 4 Yeates' Rep. 341.

Abstracts from the books of merchants abroad, with the oath of the clerk, are evidence of the shipment of goods, but they must be supported by other proof. *Ball et al. v. Keely*, 2 Yeates' Rep. 265.

When books are produced on notice, and entries are read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former entries, if made prior to the commencement of the suit. *Withers v. Gillespy*, 7 Serg. & R. Rep. 10.

It seems the rule is different if the party inspect the books with a view to their being read. *ibid.*

The books of accounts and oath of the party, are in no case admissible to charge a person with goods delivered, by order, to a third person, unless the order be otherwise proved. *Kerr et Co. v. Love*, 1 Wash. Rep. 173.

In *North Carolina*, in an action for goods sold, where the hand writing of the clerk who made the entries, was proved, they cannot be admitted in evidence, although he was absent from the State. *Kennedy v. Fairman*, 1 Bayw. Rep. 458. *Whitfield v. Walk*, 2 Do. 24.

In *South Carolina*, the books of a brickmaker or other mechanic, as well as of a merchant, are admissible to prove the performance of a particular job of work in the course of his trade, and of articles furnished. *Petrie v. Lynch*, 1 Nutt & McCord's Rep. 131. Et vide *Thomas v. Dyott*, *ibid.* 187.

But not to prove or contradict a special contract. *Prichard v. M. Owen*, *ibid.* 131, n.

Nor to prove a verbal order of the defendant to let his ward have clothes. *Darby v. Deas*, 1 Nutt & McCord's Rep. 437.

of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." But in cases where the party making the declaration is so infamous as not to be competent to give evidence if sworn, the mere circumstance of his approaching death does not give credit to his relation; and therefore the dying declaration of a thief at the gallows is not received as any evidence whatever.(c)

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Drammond's
case, ib. 378.

Entries in a merchant's books, must be proved by the clerk who made them, if in the State, and the reach of the process of the Court. *Tunno v. Rogers*, 1 Bay's Rep. 480.

Mechanics' and tradesmen's books, are good evidence to prove their accounts, and should be put on the same footing as those of shopkeepers. *Lamb v. Hart*, 2 Do. 362.

Original entries in a merchant's or shopman's books, are good evidence to prove the debt, and are *prima facie* evidence of a delivery. *Foster v. Sinkler*, 1 Bay's Rep. 45. *Slade v. Teasdale*, 2 Do. 179. Vide *Spencer v. Sanders*, 1 Do. 119. *Tunno v. Rogers*, *ibid.* 480. *Lamb v. Hart*, 2 Do. 362.

But entries in the front leaf, and not in the regular account of charges, not proper to go to the jury. *Lynch v. M' Hugo*, 1 Bay's Rep. 33.

Quere. Whether in *South Carolina* the books of a seine maker are evidence. *Story v. Adm. of Perrin*. 2 Rep. Const. Ct. S. Car. 220.

The books of a miller are evidence. *Gordon v. Arnold*, 1 M' Cord's Rep. 517.

In *Cogswell ex'r. v. Doliver*, 2 Mass. Rep. 217, it was held, that shop books verified by the oath of the party, though not kept regularly in the manner of a day book, may be given in evidence to the jury, who are to judge of their credit; but where the items have been transferred to the ledger, it must be produced to support the daybook. *Prince v. Swett*, *ibid.* 569. See vide *Prince adm. v. Smith*, 4 Do. 455.

But in *Faxon v. Hollis*, 13 Do. 427, a tradesman's books of accounts, verified by his own oath, were received in evidence, although kept in the ledger form, and although it appeared, from his own shewing, that he first made the charges upon a slate, and after transferring them to his own book, rubbed them off.—Am. Ed.

(g) Declarations made the day after receiving the wound, and six or seven weeks before the death of the deceased, were held inadmissible. *State v. Moody*, 2 Bayw. Rep. 31.

The declarations *in extremis*, of a person who, if living, would be a competent witness, are inadmissible evidence, either in a civil action or criminal prosecution; with the only exception of cases of homicide, when the declaration of the deceased, after the mortal blow as to the fact of murder, is admitted. *Wilson v. Boeram*, 15 Johns. Rep. 226.

Evidence of the declarations of the testator, on his death-bed, that the will had been obtained from him by duress, is inadmissible to defeat it. *Jackson ex. d. Coe et al. v. Kniffen*, 2 Johns. Rep. 81.

Testimony as to the declarations of a deceased person, unless made upon oath, or *in extremis*, when he came to a violent end, is inadmissible. *Gray v. Goodrich*, 7 Johns. Rep. 95.

Declarations *in extremis*, are inadmissible in civil cases. *Wilson v. Boeram*, *Anth. N. Prius*, 176, et n. a.

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the Parties.

What a party has himself been heard to say, does not fall within the objection as to hearsay evidence. Any thing, therefore, which he admits, whether he is suing in his own right, or merely as trustee for another, or which another (1) asserts in his presence, and he does not contradict, is received as evidence against him. The like evidence may be given of any admission made by a person on whose behalf an action is brought, as where a bond is conditioned to pay a sum of money to *A.* though *A.* is no party to the record, yet any acknowledgment made by him respecting the matter in dispute will be evidence. (2) * But when such admission is offered in evidence against a man, the whole of his account must be taken together; (3) and therefore if he admit certain sums of money to be due to the plaintiff on a particular transaction, but at the same time assert (or in a written account set down) that such sums were liable to certain deductions, as where an agent admits having received a certain sum of money for timber sold, but charges another sum for the demurrage of the ship which brought the timber, his admission shall be taken against him only for the balance; and the plaintiff, if he mean to dispute the propriety of the countercharge, will be under the necessity of calling witnesses on his part to dispute

(1) *Bauerman v. Radenius*, 7 T. Rep. 663.

(2) *Hanson v. Parker*, 1 Wilson, 257.
Smith v. Lyon, 3 Campb. 465.

(3) *Randall v. Blackburne*, 5 Taunt. 245.

But declarations by an attesting witness to a forged instrument has been received. *Avoson v. Kinnard*, 6 East. Rep. 195. 3 Burr. Rep. 1244.

But evidence of the declarations of one who has given a deed with warranty, cannot be received to support the title deduced from such person, though made in *articulo mortis*, but such declarations may be received in evidence, to shew in what character and with what intent, such person entered and held possession of the land. *Jackson ex d. Youngs v. Vredenberg*, 1 Johns. Rep. 159.

A confession of a prisoner, put in writing from his mouth by a magistrate, though not signed by the prisoner, was admitted on a trial for murder. *Pennsylvania v. Stoops*, *Addis. Rep.* 383.

On an indictment for murder on the high seas, by means of poison, the Court admitted evidence of a conversation, in which the defendant, after the murder had been committed, informed the witness of a contemplated plan to administer poison to the crew of the vessel, adding, *that he had experience of it*; the evidence being admitted to prove an acknowledgment, that the witness had administered poison previously, and the acknowledgment that "he had experience of it," not being intelligible without connecting it with the rest of the conversation. *U. States v. Tardy*, 1 Peters' Rep. 458.—AM. ED.

* In *Rex v. Inhabitants of Woburn*, 10 East, 395, the Court of King's Bench held, that a rated inhabitant of a parish, between which and another parish an appeal was pending, was so far to be considered as a party to the appeal as not to be compellable to give the evidence under the Stat. 46 Geo. 3 c. 37, (*vide post*, c. 3, s. 5,) and considering him as such party, they, in two subsequent cases, admitted the declarations of such rated inhabitant as evidence against the parish wherein he was rated, though he was not named as a party in the appeal. *Rex v. Inhabitants of Hardwick*, 11 East, 589. *Rex v. Inhabitants of Whitley Lower*, 1 M. & S. 636.

it. So if he(1) admit the receipt of a sum of money, but say at the same time that he had paid it, this is no proof of a debt.(f) No evidence is received of what is said by the wife of the party, or by any other person, in his absence, unless in cases where it appears that they were employed or entrusted by him in the

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(1) 12 Vin.
Ab. (A. b.) 23.

(f) Confessions are a dangerous kind of evidence, and ought to be received with great caution. *Myers v. Baker et al. Hardin's Rep. 540.*

In no case can the declarations of a supposed grantor, or party in an instrument, who may be considered as interested at the time to declare in the particular manner testified to, be admitted for any purpose whatever. *Bartlet v. Delprat et al. 4 Mass. Rep. 702. Clarke v. Waite, 12 Do. 439.*

So the declarations of the grantor of a deed are inadmissible in evidence to prove the deed fraudulent. *Alexander v. Gould, 1 Do. 165.*

In a libel for divorce for adultery, the confessions of the respondent, uncorroborated by other circumstances are not admissible in evidence to prove the adultery. *Baxter v. Baxter, 1 Mass. Rep. 346. Holland v. Holland, 2 Do. 154. Et vide Doe v. Roe, 1 Johns. Cas. 25.*

In an action on a note of hand, a letter written by the plaintiff, acknowledging a certain parcel agreement on his part, at the time of giving it, was admitted to reduce the damages. *Levett v. Gray, 1 Mass. Rep. 297.*

The confessions of one interested in the event of a suit, but not a party, cannot be given in evidence. *Woodruff v. Whittlesey, Kirby. Rep. 62. Hamlin v. Fitch, ibid. 174. Storrs v. Whitmore, ibid. 203.*

The examination of a defendant on oath is evidence against him, but the whole must be taken together. *Benedict adm. v. Nicholls, 1 Root's Rep. 434.*

What a defendant in a public prosecution against him, confessed, may be given in evidence in an action of assault and battery, for the same cause. *Eno v. Brown, ibid. 520.*

What a party to a cause had said at one time, cannot be given in evidence by himself, to explain what he has said at a former time, which the other party has given in evidence. *Blight v. Ashley et al. 1 Peters' Rep. 15.*

Declarations of the party are evidence against him, though made after the commencement of the suit. *Morris's les. v. Vanderen, 1 Dall. Rep. 65.*

The declarations of a person under whom a party to a suit claims, are evidence against him. *Bussler v. Niesley, 2 Serg. & R. Rep. 354.*

But the declarations of an intestate, that the contract was without fraud, are not conclusive against his administrator in an action on the contract. *Duncan v. McCullough, 4 Serg. & R. Rep. 483.*

Where, in an action in which the validity of a will was in question, a witness had testified to a confidential intercourse between himself and the testator, it was held, that evidence of declarations of the testator to another witness, tending to shew that he could not have been on confidential terms with the first witness, was admissible. *Lightner v. Wike 4 Serg. & R. Rep. 203.*

The conduct and declarations of the grantor, respecting the estate conveyed, and tending to prove a fraudulent intention on his part, before the conveyance, is evidence for the jury upon an inquiry into its validity, by a creditor or subsequent purchaser who alleges it to be fraudulent. *Bridges v. Eggleston, 14 Mass. Rep. 245.*

The confessions of a party, voluntarily made to members of the same church, may be given in evidence on his trial for the crime or misdemeanor so confessed by him. *Commonwealth v. Drake, 15 Mass. Rep. 161.*

The confession of a party that he signed an instrument, is sufficient evidence, without calling the subscribing witness. *Hull v. Phelps, 2 Johns. Rep. 451.*

The whole declaration of a party must be taken together. *Carver v. Tracy,*

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(1) *Young v. Wright*, 1 Campb. 140.

(2) *Hall v. Hill*, 2 Stra. 1094.

(3) *Alban and others v. Pritchett*, 6 T. Rep. 680.

management of a business. Thus (1) an acknowledgment of a fact by the attorney in the cause is no evidence of that fact, unless made with the express view of obviating the necessity of proving it on the trial; and even the wife's acknowledgment of her having received wages, which she had personally earned, was in one case, (2) held to be no evidence against her husband, in an action brought by him for those wages; and in another, (3) where

3 *Johns. Rep.* 427. *Fenner v. Lewis*, 10 Do. 38. *Irwin v. Knox*, id. 365. *Credit v. Brown*, id. 365. *Wailing v. Toll*, 9 Do. 141. *Hopkins v. Smith*, 11 *Johns. Rep.* 161. *Grimes v. Talbot*, 1 *Marsh. Rep.* 205.

The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must prove the amount. *Quarles's adx. v. Littlepage, & Co.* 2 *H. & Munf.* 401. But it is always considered the best evidence. *Hendrickson adx. v. Miller*, 1 *Rep. Const. Ct. S. Car.* 296.

In an action against a constable for not returning an attachment, the debtor's acknowledgment of the sum he owed the plaintiff, is good evidence against the constable. *Stout v. Hopping*, 1 *Halst. Rep.* 125.

Whatever is alleged on one side, and not denied on the other, shall be taken as true. *Administrator of Porter v. Kenny*, 1 *M'Cord's Rep.* 905.

Whether an *exco* can be offered in evidence as an admission of the defendant. *Lansing v. Gaine*, 2 *Johns. Rep.* 300

Evidence of the acts of the lessor tending to conclude him and those claiming under him, will be received. *Jackson ex d. Goodrich v. Ogden*, 4 *Johns. Rep.* 140. Et vidr *Jackson ex. d. Griswold v. Bard*, *ibid.* 230.

The confessions of a tenant as to his holding, have always been received in evidence. *Jackson ex d. Kip v. Murray*, 1 *Anth. N. P. Cas.* 75.

The confession of a defendant, that a ship carried contraband goods, and that she was seized in consequence, and the testimony of the captain to those facts, was deemed sufficient evidence of the law of Great Britain. *Smith v. Elder*, 3 *Johns. Rep.* 105.

Declarations by the plaintiff that the defendant was in possession, are good evidence for the defendant in an action of trespass *quare clausum fregit*. *Parlaman v. Parlaman*, 1 *Penn. Rep.* 269.

Conversations between two persons, under one of whom, the plaintiff, and the other defendant claims, may be given in evidence. *Andrews' les. v. Fleming*, 2 *Dall. Rep.* 93.

Declarations by a mortgagee, under whom the defendant claims, may be given in evidence. *Walthall v. Johnson*, 2 *Call. Rep.* 275.

An account filed by a party is evidence for him, if admitted in evidence against him. *Jones v. Jones*, 4 *H. & Munf. Rep.* 447.

A cash account shewn to the defendant, and not objected to by him, was held sufficient evidence upon which the jury might decide. *Coe v. Hutton*, 1 *Serg. & R. Rep.* 398.

Letters written by a party, are not evidence for him, though they are against him. *Fowle et al. v. Stevenson*, 1 *Johns. Cas. in Er.* 110. *Morris's les. v. Vanderen*, 1 *Dall. Rep.* 65.

Letters written to a witness by strangers, are not evidence to prove an independent material fact, but may be received as introductory evidence. *Lewis v. Manly*, 2 *Yeates' Rep.* 200.

A letter of instructions from the plaintiff to the master of a vessel, at the time of sailing, sworn to be his only instructions, was allowed to be given in evidence by the plaintiff in an action against the underwriter, to disprove the master's authority to purchase on their account. *Story et al. v. Strettle*, 1 *Dall. Rep.* 10.

the husband and wife, who was executrix, joined in an action for a debt due to the testator, it was also held that no evidence could be received of declarations of the wife after her marriage. So a promise made by her during the coverture, will be no evidence to revive a debt due from her before marriage, so as to take the case out of the Statute of Limitations.⁽¹⁾ If this evidence is not admissible where the wife is a party, or the meritorious cause of action, the rule applies with greater force where the cause of action arises from her delinquency; and therefore

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⁽¹⁾ Vide Morris v. Norfolk, 1 Taunt. 213.

In an action by *A.* administrator of *B.* against the administrator of *C.* for money paid by *B.* to the use of *C.* letters written by *C.* to *A.* and *B.* jointly, and to *A.* separately, which seemingly indicate a joint contract, but not conclusive, are admissible. *Ash et al. v. Patton*, 3 Serg. & R. Rep. 300.

An order to pay money in the hands of the drawee, is evidence of payment, aliter of an order to deliver goods. *Bhunt exr. v. Starkey's adms. Tayl. Rep.* 110. *S. C.* 2 Hayw. Rep. 75.

In action for money paid by the surety in a bond given to the *U. States* for duties, against his principal, it was held, that the possession of the bond, with the collector's receipt, were evidence of payment by the surety, as the collector would be liable on the receipt, for the amount to the *U. States.* *Sluby v. Champlin*, 4 Johns. Rep. 461.

A receipt given by a counsel, who was deceased, for bonds which he had received to sue upon, was admitted as evidence of the time they were received. *Ashton v. Taylor*, 1 Hayw. Rep. 395.

The acknowledgment of a deceased person, who was competent to charge himself by an ordinary receipt or acquittance, was admitted as evidence that he had received money from the plaintiff for the defendant's use. *Halladay v. Littlepage*, 2 Munf. Rep. 316.

If the master of a vessel sign a bill of lading, acknowledging that the goods are in good order, and they be open to inspection, and no fraud be practised, it would not be unreasonable, in an action against the master for not delivering the goods in good order, that no evidence should be admitted to prove that the goods were not in good order when he received them. *Barrett et al. v. Rogers*, 7 Mass. Rep. 297.

But if the goods are delivered in packages, and not open to inspection, the bill of lading would not be conclusive evidence against the master of the condition of the goods, although it would be *prima facie* evidence of the highest nature. *ibid.*

In an action against the maker of a note, proof of his confession that he signed it, is not conclusive evidence of the fact; but the defendant will be permitted, notwithstanding such confessions, to introduce evidence that the signature is not his; and the opinions of persons acquainted with his hand writing, and a comparison of the signature, with other signatures, proved to be his, is proper evidence for that purpose. *Hay et al. v. Huse*, 10 Mass. Rep. 39.

If the confession of a party be given in evidence against him, it must be taken altogether; and the observance of this rule is peculiarly necessary when the confession is introduced for the purpose of proving a contract. *Whitwell v. Wyer, et al.* 11 Mass. Rep. 6. This rule prevails in civil, as well as criminal cases. *Newman v. Bradley*, 1 Dall. Rep. 240. *Farrell v. M^c Clea*, *ibid.* 392. Vide *Barnes exr. of Kay v. Kelly*, 2 Hayw. Rep. 45.

An attorney or counsel concerned in a cause, may be a witness, although his judgment fee depends on his success. *Newman v. Bradley*, 1 Dall. Rep. 241.

So, although he expects a larger fee, if his client succeeds. *Miles v. O'Hara*, 1 Serg. & R. Rep. 32.—AM. ED.

Ch. I. in an action for enticing away the plaintiff's wife, her declarations made at a subsequent time are inadmissible;(1) but if at the time of her elopement she stated as a reason for so doing, that she was apprehensive of personal violence from her husband, and the defendant crediting her story received her into his house,(2) such declaration is admissible in evidence as part of the *res gesta* to shew that the defendant did not harbour her from improper motives.(g)

Admission of wife, servant, or attorney.

(1) *Winsmore v. Greenbank*, Willes, 577.

(2) *Philip v. Squire*, Peak. N. P. Cas. 82. See also 6 East, 169.

Indeed, where the wife originally made a contract which was afterwards either expressly or tacitly ratified by the husband,

(g) The policy of the law, excludes the husband or wife from testifying, where the right of either are concerned. *Les. of Snyder et al. v. Snyder*, 6 Binn. Rep. 488.

A husband cannot be a witness in a question where the wife's interest is concerned, although her interest is contingent, and not to take effect until after his death. *ibid.* 483.

In an ejectment by the children of A. to recover land which had been sold by order of the Orphans' Court, alleged to be void, one who has married the widow of A. is not a competent witness for the plaintiffs, although he has executed a release of all interest of dower or otherwise. *ibid.*

A wife cannot be a witness, where by her testimony her husband can by any possibility be criminated; as on an indictment against a third person for fornication with her husband, the wife cannot be a witness to prove the fact. *Commonwealth v. Schriver*, Quart. Ses. Phil. 1820, M. S.

On an indictment for fornication and bastardy, a married woman is a competent witness to prove the criminal connection with her. *Commonwealth v. Miller* cited, 1 Browne's Rep. Ap. 52. *Commonwealth v. Stricker*, *ibid.* 47. *Commonwealth v. Conelly*, *ibid.* 284. *Commonwealth v. Shepherd*, 6 Binn. Rep. 283. *The King v. M'Lean* cited, 6 Binn. Rep. 290.

But she is not competent to prove the non-access of her husband. *ibid.*

But if the Court permit her to be asked a question, from the answer to which non-access may be inferred, and afterwards direct the jury that they were not to consider any thing which fell from her as evidence of non-access, and there is strong evidence of non-access by other witnesses, the verdict will not be disturbed. *Commonwealth v. Shepherd*, 6 Binn. Rep. 283.

In an indictment for forcible entry, the wife of the prosecutor may be examined to prove only the force. *Commonwealth v. Shryber et al.* 1 Dall. Rep. 68. *Commonwealth v. Devore*, 1 Yeates' Rep. 501.

The deposition of a wife on her death bed, charging her husband with murdering her, was admitted as evidence against him, on his trial for the murder. *Commonwealth v. Stoops*, Addis. Rep. 332.

On an indictment for a conspiracy in inveigling a young girl from her mother's house, and, she being intoxicated, procuring the marriage ceremony to be recited between her and one of the defendants, the girl is a competent witness to prove the facts. *Commonwealth v. Hevce et al.* 2 Yeates' Rep. 114.

Evidence of the wife's confessions, made subsequent to the marriage, of a debt due by her previous to the marriage, are inadmissible to charge her husband. *Ross et ux. v. Winners*, 1 Halst. Rep. 366.

For confessions of judgment by an attorney without authority, vide *Denton et al. v. Noyes*, 6 Johns. Rep. 296. *M'Callough v. Guetner*, 1 Binn. Rep. 214.

He can take off a non pros. *Reinholt v. Alberti*, 1 Binn. Rep. 469.—A. E. D.

her declarations have been received as evidence to charge him ; and therefore in an action for nursing the defendant's child, his wife's admission that she had agreed to pay 4s. a week, was allowed to be given in evidence, the Chief Justice (PRATT) observing, that matters of this kind were properly under the directions of the wife ; (1) and in like manner the admissions made by an under Sheriff, (2) or bailiff, to whom the warrant is directed, (3) have been received as evidence against the Sheriff, in an action against him for an escape, because he is answerable for the acts of his under Sheriff, or bailiff, and they give bond to him for the due performance of their duty. (h)

But though in the cases which have been just mentioned, the admissions of the *wife*, the *under Sheriff*, and the *bailiff* were received in evidence, it may still be doubted, (4) whether they were rightly received further than as part of the *res gesta*, and we may now consider it as clearly settled, that the admissions of a mere servant are only receivable to that extent. In one case, (5) indeed, where a person who was proved to be the captain of the defendant's ship, on board of which the plaintiff had delivered goods, had by letter acknowledged the receipt of them, such letter was held by Mr. J. BULLER to be good evidence of the delivery. The propriety of this decision was afterwards questioned : and the cause being determined in favour of the defendant, on another ground, the Court gave no opinion of this point ; but, in a subsequent case, (6) Lord KENYON, alluding to this decision, expressed a doubt whether the evidence was properly admitted ; (7) and that learned Judge is said to have frequently held at *Nisi Prius*, that the agent must himself be called

Ch. L.
Admission of
Agent.

(1) Anonymous, 1 Stra. 527. See also Emerson v. Blenden, 1 Esp. Cas. 142.

(2) Yabaley v. Doble, 1 Ld. Raym. 190.

(3) North v. Miles, 1 Campb. 389.

(4) Vide Bowsher v. Cully, cited 1 Campb. 391.

(5) Biggs v. Lawrence, 3 T. Rep. 454.

(6) Bauerman v. Radenius, 7 T. R. 668.

(7) Ib. 665.

(h) It is a well settled principle, that the husband is not bound by the contract of his wife, unless by some act or declaration, prior or subsequent to the contract, his consent may be fairly inferred. *Webster v. Mc Ginnis*, 5 Binn. Rep. 236.

Where the wife of an innkeeper was entrusted with the ordinary business of the tavern, it was held that she had no authority to bind the husband, by a special contract, to board stage drivers, and find hay and oats for their horses, at less than the usual rates. *ibid.* 235.

Payment made *bona fide* to the wife in the usual course of dealing of a debt due to the husband, is payment to the husband. *Spencer v. Tisme*, *Addis. Rep.* 315.

But if made to take the management of an estate from the husband, it is no payment. *ibid.* Et vide *Hughes's adms. v. Stokes's adms.* 1 Hayw. Rep. 372.

In an action against the Sheriff for a false return, admissions by the deputy, to the plaintiff, allowed as evidence against the Sheriff. *Aza et al. v. Estlinger*, *Anth. N. P.* 74. n. a. Et vide, *Tyler v. Ulmer*, 12 *Mass. Rep.* 163.

Quere, Whether the acknowledgment of a deputy Sheriff, of things done by him in the course of his office, is evidence against his principal. *Hecker v. Jarret*, 3 *Binn. Rep.* 404. In the case of *Mott v. Kip*, 10 *Johns. Rep.* 478, the confessions of the deputy were admitted to charge the Sheriff. *Aza et al. v. Estlinger*, *Anth. N. P.* 74. n. a.—AM. Ed.

Ch. I. as a witness; and in several late cases, (1) it has been held, that
 Admission of letters of an agent abroad, even to his principal, containing an
 agent or account of a by-gone transaction, were not evidence against
 partner. such principal to prove the facts stated in them. These cases,

(1) *Kahr v. Jansem*, 4 Taunt. 565.
Reyner v. Pearson, 4 Taunt. 663.
Langhorne v. Alnutt, 4 Taunt. 511.
 however must be understood as applicable only to mere admissions of *antecedent facts*, and not to what an agent says at the time he does an act in the regular course of his business, for, in the latter case, his words being part of his act are clearly admissible against his principal.

Thus, if a person who is the acknowledged agent of another, make a contract by letter or other writing, proof of his hand writing is sufficient evidence of his contract, without calling him as a witness. (2) So where a man having made a policy of insurance on the life of his wife, (3) (who had taken a journey to *Manchester*, for the purpose of procuring the certificate of a surgeon as to her health, preparatory to making the insurance) she was soon after confined to her bed by illness, in which state she was visited by a friend; to whom she stated that she was poorly when she went to *Manchester*, and that she was afraid she should not live till the policy was completed. Shortly after this she died, and an action being brought by the husband on the policy, the Court held that the declarations so made by the wife were admissible in evidence on the part of the defendant, as shewing her opinion of the ill state of her health at the time of effecting the policy. The admission of a person who is proved to have been a partner with the party in the cause by other evidence, may also be received against his partner though made after the dissolution of the partnership. (i)

(2) *Daniel v. Hill*, B. R. Tr. 47 Geo. 3.
Fairlie v. Hastings, 10 Ves. ju. 126. S. P.
 (3) *Avison v. Lord Kinaird*, 6 East. 188.

Wood v. Braddick, 1 Taunt. 104.
Potherick v. Turner, ib. 105.

(i) The power of an agent to sell lands must be in writing, and proved by indifferent witnesses. *Nicholson's les. v. Miffin*, 2 Dall. Rep. 246. S. C. 2 Yeates' Rep. 38. S. P. *Meredith's les. v. Mucoss*, 1 Yeates' Rep. 200. *Girard's les. v. Krebs et al.* cited 2 Yeates' Rep. 38. *Les. of Plumsted v. Rudebagh*, 1 Yeates' Rep. 502.

An agent is not a competent witness to prove that a written authority was given, but had been mislaid. *Nicholson's les. v. Miffin*, ut supra.

But it seems an agent may prove the mere loss of the written power. *Meredith's les. v. Mucoss*, 1 Yeates' Rep. 200.

But one who acted as agent for another in the purchase of land, was admitted to establish the purchase. *Miller v. Hayman*, 1 Yeates' Rep. 23. *Les. of Steward v. Richardson*, 2 Yeates' Rep. 89. i

So one who purchased land in his own name, may be admitted to prove that he acted in the purchase as agent and trustee of another, to whom he afterwards conveyed the land. *Brown v. Downing*, 4 Serg. & R. Rep. 497.

A broker is a good witness in an action on the case, to recover the difference on a stock contract, to prove that he had received a verbal authority to make the contract. *Livingston et al. v. Swanwick*, 2 Dall. Rep. 300.

A distinction has been made between an admission and an offer of compromise, after a dispute has arisen. An offer to pay a sum of money in order to get rid of an action, is not received as evidence of a debt: the reason often assigned for it by Lord MANSFIELD was, that it must be permitted to men "to buy their

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Offer of
Compromise.

Bul. N. P.
[236.]

Where the contract for the transfer of stock had been made with *A.* as a principal, and an action had been brought upon it by *A.* in his own name, wherein he became non suit, in a subsequent action by *B.* on the same contract, it was ruled that *A.* could not be a witness to prove that he acted as agent for *B.* *Anderson v. Hayes*, 2 Yeates' Rep. 95.

Querre, Whether the principle of law in relation to sales made by a broker, as between vendor and vendee, is applicable to a case between vendee and warrantor. *Willing et al. v. Consequa*, 1 Peters' Rep. 310.

In an action by the vendee against the warrantor of goods, a witness who had given certificates as to the quality of the goods, which were to be used in obtaining a recovery against the warrantor, and who expected to receive a certain commission on the sum recovered, in consequence of the certificates, but which were not evidence in the action, was held to be competent. *ibid.* 309.

In an action of covenant for non-payment of rent, a witness who was grandson of the testator, was admitted to prove, that by the order of the testator, he had written a letter in his name to the defendant, directing him to pay two years' rent to the witness, as a token of his affection; the testator having been prevented by age from writing himself, and the witness having been released by the defendant. *Buchanan v. Montgomery*, 2 Yeates' Rep. 72.

An auctioneer who has sold goods to *A.* and committed them to the care of his servant, to be delivered to the vendee on his performing the conditions of sale, is a competent witness for the plaintiff in an action of replevin brought by the servant against *A.* who had obtained possession by artifice and deceit. *Harris v. Smith*, 3 Serg. & R. Rep. 20.

A ship's agent in a foreign port is a competent witness to prove by whom goods were shipped. *Andre v. Care*, 3 Yeates' Rep. 101.

The declarations of the grantor of a deed are inadmissible to prove it fraudulent. *Alexander v. Gould*, 1 Mass. Rep. 165. Et vide *Clarke v. Waite*, 12 Do. 439. And further as to the admissibility of persons not parties. *Greenwood v. Curtis*, 6 Do. 353. *Appleton v. Boyd*, 7 Do. 181.

An agent who has promised to refund money received on account of his principal, in case a verdict pass against him in a particular suit, is a good witness in that suit. *Renudet v. Crocker*, 1 Caines' Rep. 167.

An agent is a competent witness *ex necessitate*. *Cortes v. Billings*, 1 Johns. Cas. 270.

An agent of the insured who applies to the broker to have the insurance effected, is, like all other agents, a competent witness *ex necessitate*. *Mackay v. Rhineland*, 1 Johns. Cas. 408. Vide *Burthingham v. Deyer*, 2 Johns. Rep. 189.

The declarations of the wife, while acting as agent for her husband, may be given in evidence in a suit brought by him. *Hughes's adms. v. Stoker's adms.* 1 Hayw. Rep. 372.

Hearsay, from the agent of defendant, may be given in evidence against him. *Parkins v. Burnet*, 2 Root's Rep. 30.

What the son of defendant had said when acting as attorney for his father, may be given in evidence. *Mather v. Phelps*, *ibid.* 150. Et vide *Dyer v. Girard*, *ibid.* 55.

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peace," without prejudice to them if such offer did not succeed; and such offers are made to stop litigation, without regard to the

Quere, Whether an agent, authorised to purchase goods at a certain price, and at a certain credit, can agree, so as to bind his principal to give endorsed notes or securities. *Bailey et al. v. Ogden et al.* 3 *Johns. Rep.* 399.

The authority of one as agent for the plaintiff to discharge the defendant from custody, on an execution, without satisfaction of the debt, must be clearly and fully proved, and strictly pursued. *Crary et al. v. Turner*, 6 *Johns. Rep.* 51.

If the agent exceed his authority to draw bills on his principal, he is not bound to accept them. *Hopkins v. Blane*, 1 *Call's Rep.* 361. *Blane v. Proudfit*, 3 *Do.* 307. *Tunno v. Sukely*, 2 *Bay's Rep.* 505.

If the agent be in the habit of drawing bills in consequence of a notorious agency, which have been regularly paid by the principal, he will be bound to pay other bills drawn upon him, although the agent misapply their proceeds. *Hoe et al. v. Oxley et al.* 1 *Wash. Rep.* 23. *Brown v. Bull*, 3 *Mass. Rep.* 211.

The act of the agent becomes the act of the principal, where the agent uses a discretion within his power, or his acts are sanctioned by the principal. *Lyle v. Clason*, 1 *Caines' Rep.* 323.

The acts of the principal, adopting those of his agent, are to be liberally construed. *Codwise et al. v. Hacker*, *ibid.* 526.

An agent or broker authorised to purchase goods on certain terms, is a competent witness, in a suit between the vendor and vendee, though he has exceeded his authority. *Bailey et al. v. Ogden*, 3 *Johns. Rep.* 394.

If in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmance of his power to draw, that the principal will be bound to pay other bills, though the agent should misapply the money raised by such bills. *Hoe et al. v. Oxley et al.* 1 *Wash. Rep.* 19. Et vide *Hopkins v. Blane*, 1 *Call's Rep.* 361. *Blane v. Proudfit*, 2 *Do.* 307. *Brown v. Bull*, 3 *Mass. Rep.* 211. *Tunno v. Sukely*, 2 *Bay's Rep.* 505.

A foreign consul is not responsible in an action on a contract made by him on account of his government. *Jones v. Le Tombe*, 3 *Dall. Rep.* 384. Et vide *Hodgson v. Dexter*, 1 *Cranch's Rep.* 345. *Syme v. Butler*, 1 *Call's Rep.* 105. *Tutt v. Lewis*, 3 *Do.* 233.

In *Massachusetts*, vide *Brown v. Austin*, 1 *Mass. Rep.* 208. *Bainbridge v. Downie*, 6 *Do.* 353. *Tippets v. Walker*, et al. 4 *Do.* 595. *Summer adm. v. Williams et al.* 8 *Do.* 198. *Freeman v. Otis*, 9 *Do.* 272. *Mann v. Chandler*, *ibid.* 335. *Dawes v. Jackson*, *ibid.* 490.

In *New York*, vide *Sheffield v. Watson*, 3 *Caines' Rep.* 70. *Gill v. Brown*, 12 *Johns. Rep.* 385. *Walker v. Swartwout*, 12 *Johns. Rep.* 444. *Swift v. Hopkins*, 13 *Do.* 313. *Bronson v. Woolsey*, 17 *Do.* 46.

As to the liability of public agents for payments of money coming into their hands officially, vide *Penhallow v. Doane*, 3 *Dall. Rep.* 54. *Hills et al. v. Ross*, *ibid.* 331.

Notice to the agent is not requisite in the case of a compulsory payment, and one not made expressly for the use of the principal. *Ripley et al. v. Gelston*, 9 *Johns. Rep.* 301.

An agent is not liable for paying over money without notice. *Ashe v. Livingston*, 2 *Bay's Rep.* 85.

Where an agent received a bill for collection, although his conduct in the first instance would make him liable to his principals, yet they might waive his responsibility by ratifying his acts. *Fowle et al. v. Stephenson*, 1 *Johns. Cas.* 110. *Codwise et al. v. Hacker*, 1 *Caines' Rep.* 527.

A master is not answerable in damages for the unauthorised acts of his negroes. *Snee v. Price*, 2 *Bay's Rep.* 345.—AM. ED.

question, whether any thing, or what is due. Therefore, if *A.* sue *B.* for 100*l.* and *B.* offer to pay him 20*l.* it shall not be received in evidence; for this neither admits nor ascertains any debt, and is no more than saying, he would give 20*l.* to get rid of the action; but if an account consist of ten articles, and *B.* admit that such a one is due, it will be good evidence for so much. (*k*)

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Offer of
Compromise.

Admissions of *particular articles* before an arbitrator are also good evidence, for they are not made with a view to compromise, but the parties are contesting their different rights as much as they could do on a trial. (*l*)

Westlake v.
Collard, Bul.
N. P. [336]
Slack v. Bu-
chanan,
Peake's Cas. 5.

On the same principle, the confession of a felon voluntarily made is evidence against him on his trial; but if any threats or promises have been made to induce him to confess, no evidence of such confession is admitted; for a man, under such influence, might be tempted to confess what was not true, in the hope of being discharged from prosecution, or of receiving a slighter punishment than if he were convicted on other evidence; yet, if in consequence of the confession so obtained, the stolen property be found, evidence of that *fact* may be admitted, though the confession as to the circumstances under which it was taken, cannot be given in evidence. (*m*)

Confession of a
Felon.

Rex v. War-
wickshall,
Leach. Cro.
Law, 299.

(*k*) An offer made by one party, but not accepted by the other, cannot be given in evidence. *Herr v. Slough*, 2 *Brownes' Rep.* 112. n. *Slocum v. Perkins*, 3 *Serg. & R. Rep.* 295. *Baird v. Rice*, 1 *Call's Rep.* 26.

Yet if it contains an admission of a fact, it may be used to prove that fact. *Church v. Steele's heirs*, 1 *Marsh. Rep.* 323. Vide ante.—AM. Ed.

(*l*) In *Pennsylvania*, evidence of what passed before referees or arbitrators, between the parties, may be given in evidence.—AM. Ed.

(*m*) A confession of a prisoner put in writing, from his mouth by a magistrate, though not signed by the prisoner, was admitted on a trial for murder. *Commonwealth v. Stoops*, *Addis. Rep.* 383.

The whole confession ought to be taken together, in a criminal as well as a civil case. *Newman v. Bradley*, 1 *Dall. Rep.* 240. *Furrell v. McClea*, *Mid.* 392. *Barnes ex. of Kay v Kelly*, 2 *Hayw. Rep.* 45.

On an indictment for murder on the high seas, by means of poison, the Court admitted evidence of a conversation, in which the defendant, after the murder had been committed, informed the witness of a contemplated plan to administer poison to the crew of a vessel, adding that he had experience of it; the evidence being admitted to prove an acknowledgment that the witness had administered poison previously, and the acknowledgment that "he had experience of it," not being intelligible, without connecting it with the rest of the conversation. *U. States v. Tardy*, 1 *Peters' Rep.* 458.

Confession of guilt made by the defendant under promises of favour to be shown him by the prosecutor, are not admissible in evidence against him. *Commonwealth v. Chabcock*, 1 *Mass. Rep.* 144.

Ch. I.

Acts amount-
ing to Admis-
sions.

Bevan v. Wil-
liams, 3 T.
Rep. 635, n.

(1) Radford v.
Briggs, 3 T.
Rep. 637.

(2) Watson v.
Threlkeld, 2
Esp. Cas. 637.

In like manner as what a man says will be evidence against him of the fact so admitted; acts done by him will sometimes preclude him from disputing his situation. If a man hold himself out to the public as filling any particular station, he prevents the necessity of evidence against him to prove that he is legally entitled to it.⁽ⁿ⁾ Thus, if a clergyman receive tithes, and an action is brought against him for non-residence, the proof of his having so received tithes, and acted in the character of parson, is sufficient evidence that he is so: or if an innkeeper write over his door that he is licensed to let post-horses,⁽¹⁾ and afterwards commit an offence against the post-horse Act, there needs no evidence of his being licensed, than the information so held out by himself to the public. If a man live with a woman to whom he is not married, and suffer her to pass in the world as his wife,⁽²⁾ he will be answerable for such contracts made by her, as would be binding on him if made by a woman to whom he was actually married; for in all these cases

A confession before a magistrate, though not in writing, will be received. *State v. Irwin*, 1 *Hayw. Rep.* 112.

A confession of guilt uncorroborated by circumstances, not evidence in a criminal case to convict. *State v. Long*, 1 *Hayw. Rep.* 456. *State v. Moore*, *ibid.* 482.

The confession of a prisoner, though confidential, may be given in evidence on a trial against him. *The State v. Thompson*, *Kirb. Rep.* 345.

But what is disclosed to the Attorney General, upon application made to the prisoner, shall not be given in evidence against him. *The State v. Phelps*, *ibid.* 282.

On an information for counterfeiting guineas, evidence of the confession of the party was admitted, though the guineas were not produced. *The State v. Phelps*, 3 *Root. Rep.* 87.

If the confession of defendant be obtained by personal suffering it ought not to weigh in the least. If by fear or flattery, the jury must determine its weight; and if unsupported by circumstances, it cannot operate to convict. *The State v. Jenkins*, 2 *Tyl. Rep.* 377. Vide *Hamilton v. Williams*, 1 *Do.* 15.

The expectation alone of mercy will not destroy the credit of a confession. *Commonwealth v. Dillon*, 4 *Dall. Rep.* 116.

The confession of the defendant, on a trial for high treason, will be received in evidence. *Respublica v. Roberts*, 1 *Dall. Rep.* 39. *Respublica v. M^cCarty*, 2 *Do.* 86.

The confession of a party is the highest evidence. *Corp. of Colum. v. Harrison*, 2 *Rep. Const. Ct. S. Carolina*, 215.—AM. ED.

(n) In case of all peace officers, constables, &c. it is sufficient to prove that they acted in those characters without producing their appointments. *Potter v. Luther*, 3 *Johns. Rep.* 431. *Reed v. Gillet*, 12 *Do.* 696. *Fowler v. Bebee et al.* 9 *Mass. Rep.* 231. *Young et al. v. The Commonwealth*, § *Binn. Rep.* 88.

The acknowledgment of a deed before a person who styles himself a justice of the Court of Common Pleas, is *prima facie* evidence that he is such. *Les. of Wil-link v. Miles*, 1 *Peters' Rep.* 429.

The acting in a public capacity merely raises a presumption of a due appointment, and does not exclude evidence to the contrary. *Rex v. Verelst*, 3 *Camp. Rep.* 452.—AM. ED.

the person avails himself, as far as is in his power, of the legal benefits of the situation, and therefore the law considers his own acts as conclusive evidence to charge him with the duties of it.^(o)

Ch. I.
Presumptive
Evidence.

So in many cases where one man treats with another, as filling a particular station, and derives a benefit from him, he will not afterwards be permitted to dispute his title, as if a farmer take his tithes by permission of the clergyman, or a person letting out post-horses account with another as farmer of the duty,⁽¹⁾ the person so admitting the title of the other and acting under it, will not be permitted afterwards to call on him to prove it: and in like manner where *A.* rented the glebe lands of a rectory of *B.* the incumbent, and paid him rent,⁽²⁾ he was not permitted in an action for use and occupation to dispute the title of his lessor by proving that his presentation was simoniacal. So where two persons who were alien enemies, carried on trade at *Lisbon* under the name of a third, who was a *Portuguese*, which country was in amity with this country, and on a cargo which they had shipped being captured and libelled as enemy's property, they permitted such third person to claim the goods in the Admiralty Court as his own, and to obtain a decree for the restitution of them to him; the persons who had thus colluded with a third to deceive the Court, were held to be estopped from afterwards maintaining an action for money had and received against him to recover the value of the goods.⁽³⁾

(1) *Radford v. McIntosh*, 3 T. Rep. 632.

(2) *Cooke v. Loxley*, 5 T. Rep. 4.

(3) *De Mitton v. De Mello*, 12 East, 234.

Most of the foregoing cases may be classed under the head of presumptive evidence; for there was no proof of the particular fact; but the conduct of the party afforded such pregnant evidence of it, that he was precluded from denying it. This is the most violent presumption; but there are other presumptions which are only probable, and therefore may be rebutted; for in all cases where positive and direct evidence is not to be obtained the proof of circumstances, and facts consistent with the claim of one party, and inconsistent with that of the other, is deemed sufficient to enable a Court of Justice, or more correctly speaking, a jury under its direction, to *presume* the particular fact which is the subject of controversy; for the mind, comparing the circumstances of the particular case with the ordinary transactions of mankind, judges from those circumstances as to the pro-

(o) The wife may be constituted the agent for the husband, and payment to her in the usual course of business will be conclusive on him. *Spencer v. Tissue*, *Addis. Rep.* 319. *Hughes' adms. v. Stokes' adms.* 1 *Hayw. Rep.* 372.

Vide post Chap. II. sec. 2.—*Am. Ed.*

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babily of the story, and for want of better evidence, draws a conclusion from that before it. Long and undisputed possession of any right or property, affords a presumption that it had a legal foundation, and rather than to disturb men's possessions, even records have been presumed.

Thus where there had been a long and uninterrupted enjoyment of a rectory, which originally belonged to the Crown, a grant was presumed,(1) as was a conveyance of tithe hay, before the restraining Statutes, though an ancient endowment was shewn:(2) and where a corporation had for three hundred and fifty years been in the receipt of port duties, which could only originate in a grant from the Crown, such grant was also presumed,(3) as was an enfranchisement of lands, originally copyhold, which had long been occupied and treated as freehold.(4) * And where a Lord of a manor entered into an agreement with several customary tenants as to the terms on which

(1) *Beadle v. Beard*, 12 Co. 5. *Powell v. Milbank*, cited Cowp. 103, and 1 T. Rep. 399.

(2) *Lady Dartmouth v. Roberts*, 12 East, 334, and vide post, [414.]

(3) *Mayor of Kingston upon Hull v. Horner*, Cowp. 102.

(4) *Roe dem. Johnson v. Ireland*, 11 East. 280.

* In like manner a recovery has been presumed after a very long possession. *Hasselden v. Bradney*, Tr. 11, 12 Geo. 2, B R cited 3 T. Rep. 159, and now by Stat. 14 Geo. 2, c. 20, it is expressly provided, "That all common recoveries suffered or to be suffered without any surrender of the leases for life, shall be valid: provided it shall not extend to make any recovery valid, unless the person entitled to the first estate for life, or other greater estate, have or shall convey, or join in conveying an estate for life, at least to the tenant to the *precipe*." And by the same Act, where any person has or shall purchase for a valuable consideration any estate, whereof a recovery was necessary to complete the title, such person, and all claiming under him, having been in possession from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed making a tenant to the *precipe*, and declaring the uses; and the deed so produced (the execution thereof being duly proved) shall be deemed sufficient evidence that such recovery was duly suffered, in case no record can be found of such recovery, or the same should appear not regularly entered: Provided, that the person making such deed had a sufficient estate and power to make a tenant to the *precipe*, and to suffer such common recovery. It is further enacted, that every common recovery suffered, or to be suffered, shall, after the expiration of twenty years, be deemed valid, if it appear upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate or power to suffer the same, notwithstanding the deed to make a tenant to such writ shall be lost. It is further enacted, that every recovery shall be deemed valid, notwithstanding the fine or deed making a tenant to such writ shall be levied or executed after the time of the judgment given, and the award of seisin: provided the same appear to be levied or executed before the end of the term in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same. This Act only extends to cases where the party suffering the recovery, had a sufficient estate to enable him to do so, and does not alter the rules of evidence in the case of a recovery, suffered by a tenant in tail in remainder during the existence of the estate for life. In such case if the possession has long gone according to the recovery, a surrender of the life estate will be presumed; but if disputed recently after the death of the person who was entitled to hold without the aid of the recovery, it will not. *Bridges v. Duke of Chandos*, 2 Burr. 1065.

they should in future cut their wood, a subsequent different course of cutting by the occupiers of one of the estates with the knowledge of the Lord, was held to be admissible, though not very strong evidence, to shew that the deed had been departed from, and some subsequent grant made authorising such mode of cutting by the tenant of the particular estate.⁽¹⁾ So the production of an original lease for a long term, and proof of possession for seventy years, has been held sufficient evidence of an assignment;⁽²⁾ and possession for twenty years, and an assignment of an old term of two thousand years, sufficient to presume the original grant of the term.⁽³⁾ In like manner, if a landlord give a receipt for rent due at *Michaelmas*, and afterwards claim rent due at *Lady-day* preceding, it furnishes a still stronger presumption that such preceding rent has been paid; and where a stale demand is made in a Court of Justice, the very circumstance of its coming late, in all cases inclines the mind to suspect that it has not a just foundation, and in many has been taken as complete evidence of the non-existence or payment of it; but these latter cases resting on presumption, and not on positive proof, very slight evidence is sufficient to rebut and overturn them, and to call on the different parties to establish their respective rights by the ordinary rules of evidence.^(p)

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(1) *Blaskett v. Lowe*, 2 Maule & Selwyn, 494.

(2) *Earl dem. Goodwin v. Baxter*, 2 Blas. 1228.

(3) *Denn dem. Targwell v. Barnard*, Cowp. 595.

(p) Nine years is not a sufficient lapse of time to afford a presumption of re-entry for the payment of rent. *Jackson ex d. Donally et al. v. Walsh*, 3 Johns. Rep. 336.

The receipt for rent arising at a subsequent period is presumptive evidence that all rent previously accruing had been paid. *Decker v. Livingston et al.* 15 Johns. Rep. 479.

Where a deed dated 14th May, 1767, recited that several of the grantors conveyed by F. their attorney, it was held, in 1809, that after so great a lapse of time, and an acquiescence in the title under that deed, the power of attorney was to be deemed valid, without being produced, or proof of its execution. *Doe ex d. Clinton et al. v. Phelps*, 9 Johns. Rep. 169. S. P. *Doe ex d. Clinton et al. v. Campbell*, 10 Do. 475.

A map and field book of partition, under the Colonial Act of 1762, presumed in 1813. *Jackson ex. d. The People v. Wood*, 12 Johns. Rep. 942.

After a lessee has quitted the demised premises, without ever having paid rent, and after fourteen years possession under conveyances from a lessor, who had a right to enter in default of payment, a demand and re-entry will be presumed. *Jackson ex. d. Goose v. Demarest*, 3 Caines' Rep. 382. Et vide *Jackson ex. d. Smith v. Stewart*, 6 Johns. Rep. 34.

Where a person might have claimed a conveyance from a devisee, by virtue of a trust in the will of the deviser, and entered on the premises in 1759, and had uninterrupted possession, as far as possible, a deed is to be presumed. *Van Dyck v. Van Beuren*, 1 Caines' Rep. 34. Et vide *Jackson ex. d. Gillespey et al. v. Woolsey*, 11 Johns. Rep. 446.

An ouster was presumed where no claim had been made for forty-two years. *ibid.*

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(1) *Forbes v. Wale*, 1 Blac. 532.
Colset v. Budd, 1 Campb. 27.
Curteis and another v. Fitzpatrick and another, K. B. aft. M. T. 1796.

(2) *Eldridge v. Knott*, Cowp. 314.

Where a bond has not been put in suit, or interest paid upon it, for twenty years, the law calls upon the obligee to give some reason for the delay, and in default of his doing so, presumes that it has been paid; and the same rule applies to a *scire facias* brought for execution on a judgment; (1) but in the case of a small demand, which the party had no particular interest to collect, the rule does not apply, and therefore it has been held, that mere length of time, short of the Statute of Limitations, unaccompanied by other circumstances, is not sufficient to found a presumption of a release of a quit-rent. (2)

A grant of lands under navigable waters to the owners of the adjacent soil, is not to be presumed without evidence of long exclusive possession and use. *Palmer v. Hicks*, 6 Johns. Rep. 133. *Cullar v. Blackman*, 2 Car. Law Rep. 567.

Nor a grant conferring an entire title to lands, from length of possession alone. *Sumner et al. v. Child*, 2 Con. Rep. 607.

Where an agreement for the sale of a piece of land in 1689, was produced, the jury were allowed in 1809, to presume a conveyance. *Jackson v. Murray*, 7 Johns. Rep. 5.

Where the location of a patent or grant executed nearly a century ago comes in question, every presumption will be made against a party who neglected to have his land surveyed, and its boundaries defined, or to make an actual location of them at the time. *Jackson ex d. Hardenbergh v. Schoonmaker*, 7 Johns. Rep. 12.

Where *M.* died in possession of land, and his son and heir at law succeeded him, and continued in undisturbed possession for above eighteen years, it was held, that a purchase by the ancestor might be presumed. *Jackson ex d. M'Donald v. M'Call*, 10 Johns. Rep. 377.

Where there was an order of council of the colony of *New York*, in 1764, for the survey of a lot allotted to *J. P.* and a survey made, though no patent could be found on record, it was held, that a patent to *J. P.* and a deed from him might be presumed. *ibid.*

In a suit on a note by *A.* against *B.* it was held, that a jury, from circumstances, might infer a re-delivery of the note, and that the facts were sufficient evidence of a performance of the condition on which it was left with *C.*, or that *B.* had waived or dispensed with its performance. *Grote v. Grote*, *ibid.* 402.

Where in a sale under a power in a mortgage, a drain was excepted, it was intended, after the lapse of sixteen years from the sale, that it had antecedently existed, and was founded in usage. *Bergen v. Bennet*, 1 Caines' Cas. in Error, 1.

Where the lessor had, thirty-five years before the defendant came into possession of the part he claimed, exercised acts of ownership of part, and claimed the whole, which was admitted by all the settlers on the part until many years after defendant's entry, it is to be inferred that defendant came in under the lessor, and a grant from the original patentees to him must be presumed. *Jackson v. Lunn*, 3 Johns. Cas. 109.

In ejectment, a possession for less than twenty years will form a presumption of title sufficient to put the tenant on his defence. *Smith v. Lorillard*, 10 Johns. Rep. 338.

If the Clerk of the Court certify at the foot of a paper purporting to be a record, "that the foregoing is truly taken from the record of the proceedings" of his Court, and the presiding magistrate certify that such attestation is in due form of law, it will be presumed to be a full copy of all the proceedings in the case. *Ferguson v. Harwood*, 7 Cranch. Rep. 409.

In the case of the bond, the payment of interest, or any other sufficient reason why the action was not sooner brought, would be an answer to the presumption which would otherwise arise from the length of time; but the mere fact of the defendant hav-

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Where the property of an insolvent debtor is assigned in trust for the benefit of certain creditors, their assent to the assignment will be presumed, *until* they express their dissent. *De Forrest v. Bacon et al.* 2 *Con. Rep.* 693.

Vide Wilt v. Franklin, 1 *Binn. Rep.* 502, where the assent of a trustee under an assignment for the benefit of creditors will be presumed.

For the effect of length of time in raising a legal and equitable presumption of the extinguishment of a trust, payment of a debt, &c. *vide Prevost v. Graiz*, 6 *Wheat. Rep.* 504. *Lynde v. Dennison*, 3 *Con. Rep.* 387.

Presumptions of a grant arising from lapse of time, are applied to corporeal as well as incorporeal hereditaments. *Ricard v. Williams*, 7 *Wheat. Rep.* 59.

Vide Fowler v. Savage et al. 3 *Con. Rep.* 90. *Les. of Allston v. Saunders*, 1 *Bay's Rep.* 26. *Jackson ex. d. M' Donald v. M' Call*, 10 *Johns. Rep.* 377. *Sullivan v. Alton*, 2 *Hayes. Rep.* 128. *Hunks v. Tucker*, *ibid.* 147. *S. C. Tayl. Rep.* 157.

Proof that one was represented to be a deputy surveyor, and acted as such, is evidence of a deputation. *Denn v. Pond et al.* 1 *Coxe's Rep.* 378.

Where a person is bound to do a certain act, the omission to do which would be a culpable neglect of duty, the performance of it will be presumed, unless the contrary is proved. *Hartwell v. Root*, 19 *Johns. Rep.* 345.

For presumption of a levy on an execution, *vide ibid.*

Proof of such circumstances which could not have existed, *unless a particular fact had pre-existed to give rise to them*, will be admitted as presumptive evidence of such fact. *Hopkins v. De Graffenreid*, 2 *Bay's Rep.* 190.

The exposure of goods at the door of a shop, is presumptive evidence, that they were intended for sale. *City Council v. Truchetet*, 1 *Nott & M' Cord's Rep.* 230.

The copy of a grant from the records certified by the Secretary of State, &c. is evidence sufficient to shew that an original grant once existed. *Rochell v. Holmes*, 2 *Bay's Rep.* 487.

The delivery over of a note, held by the defendant to the plaintiff, furnishes a conclusive presumption of the payment of it, unless the manner of its coming into his possession be otherwise accounted for. *Roberts v. Stagg*, 1 *Nott & M' Cord's Rep.* 430.

Where a farm had been occupied for above eighty years, during which time the tenant and his descendants uniformly paid rent to the landlord, and made permanent improvements; *held*, that a lease in fee at the acknowledged rent was to be presumed, or that there was an agreement for it. *Ham v. Schuyler*, 4 *Johns. Cha. Rep.* 1.

Where a person having the legal title to lands, but in trust for the defendant, sold his right for a valuable consideration to a *bona fide* purchaser, without notice, who remained in possession for eighteen years before his death, and devised the same; *held*, that after the lapse of thirty years from the date of the deed, and no evidence of fraud, the devisees of such purchaser were entitled to hold the lands discharged from the trust. *Coxe v. Smith et al.* 4 *Johns. Cha. Rep.* 271. *Et vide Shaver v. Rodley*, *ibid.* 310.

Where there was a perpetual lease reserving an annual rent, and none had been demanded for forty-four years, *held*, that the lapse of time was sufficient evidence that it had been extinguished. *Livingston v. Livingston*, *ibid.* 294.

Where more than twenty years have elapsed, in an action for rent reserved on a

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ing been in embarrassed circumstances without more, is not sufficient to excuse the delay. (1) The fact of interest having been paid, would be sufficiently proved by a receipt for it in the hand

(1) *William v. Gorge*,
1 Campb. 217.

lease, since the last quarters' rent became due, payment will be presumed. *Bailey v. Jackson*, 16 Johns. Rep. 210.

Where it was agreed between the lessor and his lessee that the latter should surrender his old lease, and take a new one, and a new one is accordingly accepted, a release of the old one will be presumed. *Springstein v. Schermerhorn*, 12 Johns. Rep. 357.

Where a party in possession is entitled to a conveyance, under an agreement or trust, the presumption is strong that a conveyance has been executed accordingly. *Jackson ex. d. Stoutenburgh et al. v. Murray*, 7 Johns. Rep. 5. Et vide *Van Dyck v. Van Beuren*, 1 Caines' Rep. 84.

A conveyance from trustees to *cestui que trust*, has been presumed in much less than twenty years. *England ex. d. Syburn, v. Slade*, 4 T. Rep. 682. 11 Johns. Rep. 456.

When a re-conveyance will be presumed, vide *Bigger's adms. v. Alderson*, 1 H. & Munf. Rep. 54.

A grant may be presumed, from great length of possession, although no privity can be traced between the successive tenants. *Herring v. Wigge*, N. Carolina Term Rep. 34.

What circumstances will justify the presumption of a deed, is matter of law. *Stoecker v. Les. of Witman*, 6 Binn. Rep. 416. Et vide *Sumner et al. v. Child*, 2 Con. Rep. 607.

On a trial by jury, if the evidence adduced does not appear on the record, all will be presumed legal and right. *Ford v. Gardner*, 1 Hen. & Munf. Rep. 72.

Lapse of time is permitted in equity, to defeat an acknowledged right, on the ground of the presumption that it has been abandoned. *Nelson v. Carrington*, 4 Munf. Rep. 332.

After a great lapse of time and death of the parties, a bill in Chancery was dismissed, the Court considering it a *stale demand*. *Ray v. Bogart*, 2 Johns. Cas. in Er. 432.

So in Chancery an account of stale transactions will be refused. *Randolph v. Randolph*, 2 Call's Rep. 537.

Stale redemptions have been denied after forty years. *White v. Ewer*, 2 Ventris Rep. 340.

If the party claims under an *executed* grant, he must prove the tenant died without heirs; and it will not be presumed he did so die, although he had been absent beyond seas for seven years. *Hutchins's les. v. Eriskson*, 1 H. & M'Hen. Rep. 339.

Ignorance in the family of the existence of one of the children, who had gone abroad at the age of twenty-two years, unmarried, and had not been heard of for upwards of forty years, is sufficient, with other circumstances, to warrant the presumption of his death without issue. *M'Comb v. Ogilvie*, 5 Johns. Cha. Rep. 263.

A memorandum of an agreement for the sale of lands, is evidence of an unity of title to such and every part thereof, and after a long and undisturbed possession of part by the vendee mentioned in such memorandum, the Court will presume a deed conformably thereto. *Jackson ex. d. Kip v. Murray*, Anth. N. P. Cas. 75.

Where a claim set up by a third person to a warrant and survey, remains undisputed for the space of between thirty and forty years, and there is nothing to shew that the warrantee has transferred his title to any one else, it is strong evidence to prove that the right of the warrantee vested in the claimant by some conveyance which is lost. *Les. of Galloway v. Ogle*, 2 Binn. Rep. 468.

writing of the creditor himself endorsed on the bond, before the time when the presumption was likely to arise, because then he had no interest in making such endorsement ;(1) but if made after that time, it would be no evidence.(2) (q)

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A grant of lands conferring an entire title, cannot be presumed from possession and length of time alone. *Sumner et al. v. Child*, 2 *Con. Rep.* 607.

A deed from a parent to his child, in consideration of love and affection, is presumed to be an advancement. *Hatch et al. v. Straight*, 3 *Con. Rep.* 31.

All papers found among the office papers of a deputy surveyor, may be fairly presumed to be official (unless the contrary appear) provided that there were any orders in his hands, to the execution of which the papers in question might relate. *Miller et al. v. Carothers et al.* 6 *Serg. & R. Rep.* 215.

The receipt given by counsel for a bond, was allowed in evidence to prove the time the bond was delivered to him. *Aston v. Taylor*, 1 *Hayw. Rep.* 395.

When negroes are presumed slaves in Virginia. Vide *Hudgins v. Wrights*, 1 *Brn. & Munf. Rep.* 133. *Hook v. Paces*, 2 *Munf. Rep.* 379., *Abraham et al. v. Matthews*, 6 *Do.* 159.

In *N. Carolina*. Vide *Gobus v. Gobus*, *Tayl. Rep.* 164.

A presumption from lapse of time, of payment or performance, will not affect the rights of those to whom no laches is imputable. *Lynde v. Denison*, 3 *Con. Rep.* 387.

What presumption arises from the endorsement of a note. Vide *Brunster v. Dana*, 1 *Root. Rep.* 266. *Wadham v. Vanderwooken*, *ibid.* 385.

After twenty years acquiescence by the heirs of an intestate, in the possession of the real estate of their ancestor, holden under a sale by the administrator, the Court will presume that the administrator took the oath, and posted the notifications according to law, previous to the sale. *Grady v. Gardner*, 3 *Mass. Rep.* 399.

When a negotiable note is given for a subsisting debt by simple contract, the presumption of law is, that it was received in payment of such debt ; but this may be controlled by the agreement of the parties. *Maneely Mc Gee et al.* 6 *Do.* 143.

After a lapse of more than seventy years, without any adverse claim, the jury may presume a grant from the original proprietor of a share in a township of land to a person, afterwards acting as grantee of such share, sustaining various offices as such in the corporation of proprietors, and paying taxes thereon ; although the land be not holden by any visible possession. *Farrer et al. v. Merrill*, 1 *Greenl. Rep.* 17.

But a general usage like that of depositing lumber on the banks of a river, not accompanied by a claim of possession, nor an occupancy to the exclusion of the owner's rights, cannot furnish any legal presumption of a grant. *Bathum v. Turner*, *ibid.* 109.—AM. Ed.

(q) The Courts of Pennsylvania have adopted the English rule, that after a certain length of time, a debt on bond will be presumed to have been discharged, unless the delay can be accounted for. *Penrose et al. v. King*, 1 *Yeates' Rep.* 344. So in Kentucky. *Shields v. Pringle*, 2 *Bibb's Rep.* 387. These presumptions are as much allowed in a Court of Equity as of Law. *Giles v. Baremore*, 5 *Johns. Ch. Rep.* 545.

A lapse of twenty years creates a presumption of payment, if no interest has been paid in the mean time ; but if the period be shorter than twenty years, the presumption must be supported by circumstances. *Gouldhawk v. Duane*, C. C. April,

(1) *Searle v. Lord Barring-*
ton, † 2 *Stra.*
826. 2 *Lord*
Raym. 1370,
S. C.

(2) *Mod. Rep.*
378. 3 *Bro.*
P. C. 393.—
AM. Ed.)

(3) *Turner*
v. Crisp,
2 *Stra.* 827.
Vide Wash-
ington v.
Brymer, Ap-
pendix.
(*Rose adm. v.*
Bryant,
2 *Camp. Rep.*
321.—AM.
Ed.)

† Vide the observations of SPENCER C. J. in the case of *Roseboom v. Billington*, 17 *Johns. Rep.* 184, upon this case.—AM. Ed.

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Having thus stated the general rules applicable to every species of evidence, as well written as parol, I shall now proceed to give them a distinct and separate consideration.

1809, *M. S. Rep.* *Cottle v. Payne*, 3 *Day's Rep.* 289. *Bailey v. Jackson*, 16 *Johns. Rep.* 210. *Dunlop v. Ball*, 2 *Cranch's Rep.* 180. *Higginson v. Mein*, 4 *Cranch's Rep.* 415.

But in an action tried in 1794, the Court ruled that the period between 1776 and 1784, during which the Limitation Act had been suspended, ought to be thrown out of the calculation. *Penrose et al. v. King*, 1 *Yeates' Rep.* 344.

A lapse of eighteen years and a half, was ruled not to be sufficient to found a presumption of payment of a bond, under circumstances that tended to repel the presumption. *Boltz et al. v. Ballman*, 1 *Yeates' Rep.* 584. See vide *Dehart v. Gard*, *Addis. Rep.* 344.

The law does not positively presume payment of a judgment, after nineteen years; that is a question for the jury. *Leslie v. Nones*, 7 *Serg. & R. Rep.* 410.

In *New York*, a bond will be presumed paid after eighteen or twenty years. *Exrs. of Clark v. Hopkins*, 7 *Johns. Rep.* 556. And to rebut that presumption, the obligee ought to shew a demand of payment, and an acknowledgment of the debt within that time. *ibid.*

But it must be exclusive of a period of confusion, like the revolutionary war. *Jackson ex. d. The People v. Pierce*, 10 *Johns. Rep.* 417. *Higginson v. Mein*, 4 *Cranch's Rep.* 415. *Brewton's exrs. v. Cannon's exrs.* 1 *Bay's Rep.* 483. Et vide *Quince's adms. v. Ross's adms. Tayl. Rep.* 155. *Dunlop v. Ball*, 2 *Cranch's Rep.* 180.

Where the mortgagee has never entered into possession of the mortgaged premises, and no demand has been made, or interest paid for twenty years, the mortgage will be presumed to be satisfied. *Jackson ex. d. The People v. Wood*, 12 *Johns. Rep.* 242. Et vide *Jackson ex. d. The People v. Pierce*, 10 *Do.* 414. *Brune et al. v. Wolcott*, 2 *Con. Rep.* 27. *Higginson v. Mein*, 4 *Cranch's Rep.* 415. After nineteen years it was allowed. *Jackson ex. d. Martin et al. v. Pratt*, 10 *Johns. Rep.* 381. *Ross v. Norvall*, 1 *Wash. Rep.* 18.

The payment of interest, a demand, or the obligee being an alien enemy, repel the presumption of the payment of a bond of more than twenty years standing. *Rearden v. Searcy's heirs*, 3 *Marshall's Rep.* 544. *S. C.* 1 *Lit. Rep.* 53.

So a patent of land from the State, has been presumed after a length of possession. *Archer v. Sadler*, 2 *H. & Munf. Rep.* 370. *Hanks v. Tucker*, *Tayl. Rep.* 157. Et vide *Les. of Alston v. Saunders*, 1 *Bay's Rep.* 26.

In *New York* it has been held, that acknowledging a bond and apologising for the non payment of it, will destroy the presumption arising from the non payment of interest for twenty-five years. *Smodes v. Hooghtaling*, 3 *Caines' Rep.* 48.

A presumption in law arises from the payment of the last instalment upon a bond that the preceding ones have been paid, provided it has been made in the manner and at the time contemplated by the parties. *Ward v. Green's adms.* 2 *Carolina Law Repos.* 108.

An entry made nineteen years before in the books of the defendant's testator, that a promissory note of twenty-three years standing was paid, was allowed to be read to support the presumption of payment. *Rodman v. Hoopes's exrs.* 1 *Dall. Rep.* 35.

There is a Statute in *Connecticut* limiting the payment of bonds and notes to seventeen years.

Neither an endorsement nor payment on a bond will save it from the Statute. *Gates v. Brattle*, 1 *Roots's Rep.* 187. *Fuller v. Hancock*, *ibid.* 238.

Great length of time will induce a presumption of payment of a note. *Perkins v. Kens*, *ibid.* 312.

But the presumption of payment may be met by circumstances, which account

for the delay in bringing suit. *Higginson v. Mein*, 4 *Cranch's Rep.* 490. *Levy v. Hampton*, 1 *McCord's Rep.* 145.

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An endorsement on a bond or note made by the obligee or promisee, without the privity of the obligor or promisor, is not admissible evidence of a payment in favour of the party making the endorsement, so as to repel the presumption of payment arising from the lapse of years, or to take the case out of the Statute of Limitations; unless it be first shewn that the endorsement was made at the time of its date, or when its operation would be against the interest of the party making it, and then on such proof being given, it is good evidence to go to a jury. *Roseboom v. Billington*, 17 *Johns. Rep.* 182.

Where no time is limited by law for the payment of a demand, length of time will raise a presumption of payment. *Anon.* 1 *Hayw. Rep.* 459.

In case of a bond, twenty years will raise the presumption. *Quince's adms. v. Ross's adms.* 2 *Do.* 180. *S. C. Tayl. Rep.* 155.

Length of time affords a presumption of payment in favour of a garnishee, and no interrogatory shall be put to him, eliciting an answer, to deprive him of such a defence. *Gees v. Warwick*, 2 *Hayw. Rep.* 358.

Query. Whether twenty years be the exact limit of time to commence a presumption of payment of a bond, and if fifteen or sixteen years would be sufficient. *Sheppard's exrs. v. Cook's exrs.* *ibid.* 268.

The Act of Limitation does not begin to operate until the expiration of the time limited for the payment of the money secured to be paid by the bond. *Glasgow's adms. v. Porter et al.* 1 *Har. & Johns. Rep.* 109.—*Am. Ed.*

CHAP. II.

OF WRITTEN EVIDENCE.

WRITTEN evidence has been divided by Lord Chief Baron GILBERT into two classes; the one that which is *public*, the other *private*; and this first has been again subdivided into matters of record, and others of an inferior nature. I shall follow these divisions, and treat of each in its order.

SECTION I.

Of Records.

Chap. II. s. 1. The memorials of the Legislature, such as Acts of Parliament,* (a) and judgments of the King's superior Courts of Jus-

* Of Acts of Parliament the law makes a distinction between those which are *public*, as concerning the realm, all spiritual persons, all offices, and the like, and those which settle the private rights of individuals or particular places, and which are therefore called *private*. The former are not, correctly speaking, the subject of proof in any Court of Justice, for, being the law of the land, they are supposed to be known to every man; and therefore the printed Statute Book is, on all occasions, referred to, not as evidence to prove that of which every man is presumed to be cognisant; but for the purpose of refreshing the memories of those who are to decide upon them. But private Acts of Parliament, not concerning the public, are not considered as *laws*, but *facts*, and therefore must be proved like other records which concern private rights, by copies from the Parliament Rolls; for the printed Statutes are, in this respect, only private copies, and consequently no evidence of the fact. In one case Lord C. B. PARKER permitted the printed Statute touching the College of Physicians, which is a private Act, to be read in evidence from the Statute Book printed by the King's printer; but the general, indeed universal practice, is to prove examined copies. Vide *Gilb. Law Ev.* 10, 13. To prevent this inconvenience, the Legislature frequently declares, that acts in their nature private, shall be deemed public, which enables Judges to consider them as laws, and thereby prevents the necessity of evidence to prove, or special pleading to introduce them to the notice of a Court of Justice; and with the like view the Statute 49 Geo. 3, c. 90 s. 9, enacts, that copies of the Statutes of *Great Britain and Ireland* prior to the union of those countries, printed by the printer duly authorised, shall be received as conclusive evidence of the several Statutes in either kingdom. For particular instances of what laws are considered as public, and what otherwise, vide *Bul. N. P.* 223, &c.

(a) A printed pamphlet, containing Legislative Acts not authenticated by the seal of the State, is not evidence in any other State, under the Act of Congress. *Craig v. Brown*, 1 *Peters' Rep.* 352.

tice are denominated *records*, (b) and are so respected by the law, that no evidence whatever can be received in contradiction

Chap. II. s. 1.
Judgments
and Acts of
Parliament.

A copy of an Act of Assembly of another State, contained with other Acts in a pamphlet, printed by the printers of the Commonwealth, was held to be good evidence. *Thompson v. Musser*, 1 *Dall. Rep.* 462. *S. P. Biddis v. James*, 6 *Binn. Rep.* 321. Contra, *Commonwealth v. Pruzier, Oyer and Term.* 1813, cited, *ibid.*

Copies of the laws of *Pennsylvania*, printed by the authority of the Legislature, are evidence in this State, whether the laws be public or private. *Biddis v. James*, 6 *Binn. Rep.* 321.

The written or Statute laws of foreign countries, must be proved by the laws themselves if they can be procured, if not, inferior evidence may be received. Unwritten laws or usages may be proved by parol evidence, and when proved, it is for the Court to construe them and decide upon their effect. *Conesque v. Wilking et al.* 1 *Peters' Rep.* 220. *Seton v. Del. Ins. Co. C. C. April*, 1808, *M. S. Rep. Robinson v. Clifford*, *C. C. April*, 1807. *ibid.*

The printed Statute book, containing a private Act, may be given in evidence against the party for whose benefit it was passed. *Duncan v. Dubois*, 3 *Johns. Cas.* 125.

The only evidence of a private Act, is the exemplification of it. Per *SKIDSWICK, J.* *The Prop. of Ken. Purchase v. Call*, 1 *Mass. Rep.* 433.

The printed book of the printers to the General Court, is evidence of public Acts. *ibid.*

Marine ordinances of foreign countries promulgated by the Executive, by order of the Legislature of the *U. States*, may be read in their Courts without further proof of authentication. *Talbot v. Seeman*, 1 *Cranch's Rep.* 1.

A writing purporting to be a judicial proceeding, authenticated under a national seal, will be taken notice of judicially, in other States, as having the highest evidence of authenticity. *Griswold et al. v. Pitcairn*, 2 *Con. Rep.* 85.

In *Connecticut*, a book of the Statutes of *New York*, printed by a private printer, was refused as evidence. *Bostwick v. Bogardus*, 2 *Root's Rep.* 250. *S. P. Canfield v. Squire*, *ibid.* 300.

The Court are not held judicially and *ex officio* to notice a private Act of the General Assembly. *Pearl v. Allen*, 2 *Tyl. Rep.* 311.

Private Acts of Assembly must be exhibited as documents, if they are not pleaded. *Legrand v. Hampt. Sid. College*, 5 *Munf. Rep.* 324.

The laws of a sister State must be pleaded. *Beauchamp v. Mudd*, *Hardin's Rep.* 165.

An Act of the Legislature of *Virginia*, certified by the clerk of the House of Delegates, not evidence. *Ellmore v. Mills*, 1 *Hayw. Rep.* 360.

But a printed Statute book of the laws of *Virginia*, were received in evidence. *Poindexter v. Barker*, 2 *Do.* 173.

Quere, Whether private Acts of Assembly of *Virginia*, printed by the public printer of that State, under the authority of law, may be read in evidence without other authentication. *Young v. Bank of Alexandria*, 4 *Cranch's Rep.* 384.—*AM. ED.*

(b) No proceeding is regarded as matter of record, until it is enrolled. *Croswell v. Byrnes*, 9 *Johns. Rep.* 287.

It seems that the books of the Land office, and of the Board of Property, are records. *Ream v. The Commonwealth*, 3 *Serg. & R. Rep.* 217.

Where the defendant gave in evidence the record of a trial and judgment thirty-six years back, and the plaintiff offered a witness to prove that the testimony now given was then produced, it was ruled the witness was not admissible after so great a length of time. *Leech v. Armitage*, 2 *Dall. Rep.* 125, *S. C.* 1 *Yeates' Rep.* 104.

Chap. II. s. 1. of them;* but being the precedents of the law to which every man has a right to have recourse, they are not permitted to be
 Judgments and Acts of Parliament.

In *Hennell v. Lyon adm.* 1 B. & Ald. Rep. 182, the copy of a bill and answer by a person of the same name, and sustaining the same character, were given in evidence. Proceedings of a Justices' Court, though not technically a record, are in the nature of it. *Possion v. Brown*, 11 Johns. Rep. 166.

The original files of the County Court, with the clerk's certificate, was read in evidence. *Allis v. Boodle*, 1 Tyl. Rep. 179.

Where the record of a judgment is of a term generally, and it becomes material to the rights of the parties to ascertain the particular day on which it was rendered, it may be shewn by evidence *aliunde*. *Young v. Kenyon*, 2 Day's Rep. 352.

Quere, Whether a paper filed by one party, offering to be bound by certain terms, if the verdict should be in his favour, but not accepted by the other party, can be noticed, as part of the record, by a Court of Error. *Bower v. Blessing*, 8 Serg. & R. Rep. 243.

* By the practice of the Courts at Westminster, all writs issued in vacation, are tested as of a day in the preceding term; and when an issue is made up in a proceeding by bill, the plaintiff is stated to have brought his bill into Court on the first day of the term, or of the term generally, which signifies the same thing. It was, for some time, doubted whether the parties were not estopped by this fiction, from shewing the exact day when the suit was commenced; but it was afterwards determined, that where it became necessary for the purposes of justice, to shew the day when the writ in fact issued, either party might do so; and therefore, wherever the defendant pleads a tender before the exhibiting of the bill, or that he did not promise within six years next before that time, the plaintiff may set forth in his replication the day on which the writ was sued out, and state that the tender was not made before that day, or that the defendant promised within six years before it; and in like manner, if the plaintiff's cause of action accrue within the term, the day may be proved, by the production of the writ by the plaintiff, or a copy of the *precipe*, after notice to produce it, by the defendant. *Vide Johnson v. Smith*, 2 Burr. 950. *Morris v. Pugh*, 3 Burr. 1241. But, in general, the filing of the bill is considered as the commencement of the suit, and therefore the plaintiff may give evidence of any cause of action arising before it, though after the writ sued out. *Foster v. Bonner*, Cowp. 454; and this is bailable as well as other actions. *Best v. Wilding*, 7 T. Rep. 4.†

An officer, whose business it is to keep the records, may be examined as to the condition of them, but not as to the matter of the record. *Leighton v. Leighton*, 1 Stra. 210. And if words have been struck out, which render a record erroneous, witnesses may be examined to shew that such words were improperly struck out; but not to falsify the record, by shewing that an alteration, whereby the record was made correct, was improperly made. *Dickson v. Fisher*, 1 Black. 664. 4 Burr. 2267, S. C.‡

† The original endorsement on a writ and not the entry in the Sheriff's book, is the best evidence to prove when an action was commenced. *Read v. Colcock*, 4 Nott & M' Cord's Rep. 592. *Vide Knox v. Commonwealth*, 3 Bibb's Rep. 357.

An entry on the record of the issuing of a writ, does not estop the party from denying the fact; it shall be tried *per pais*, and the record is not conclusive, but only evidence. *Brown v. Van Deusen*, 10 Johns. Rep. 51.—AM. Ed.

‡ The endorsement of the clerk of the enrolments of the day of the enrolment, by way of date, is part of the record, and cannot be averred against, nor is evidence admissible to shew that it was in fact enrolled on some other day; and this, although the date be written on an erasure. *Read v. Hooper*, 3 Price, Ex. Rep. 495.—AM. Ed.

removed from place to place to serve a private purpose; and are therefore proved by copies of them, which in the absence of the original, is the next best evidence.^(c)

These copies are of three kinds; 1st. Such as are exemplified under the great or broad seal, which by virtue of that seal, become themselves records,* and can only be of proceedings in the Court of Chancery, or those of the other Courts returned there by *certiorari*.^(d)

Chap. II. s. 1.
Exemplifications and
Sworn Copies.

Gilb. Law. Ev.
14; 3 Inst. 73.

(c) The law will not allow an averment against a record. *Commonwealth v. Churchill*, 5 Mass. Rep. 174. *Whiting v. Cochran*, 9 Do. 532. *Wright v. Mott et al.* Krb. Rep. 153. *Witter v. Brewster*, *ibid.* 422. *Butler v. Butler*, 1 Root's Rep. 275. *Bush v. Byvanks*, *ibid.* 248. *Hostler v. Scull*, 2 Do. 180.

Nothing can be proved by parol evidence, which ought to be proved by record. *Pitts v. Clark*, 2 Root's Rep. 221.

Parol evidence of a judgment will not be received, the record or a copy thereof must be produced. *Thompson v. Bullock*, 1 Bay's Rep. 366.

The report of a committee on a bill in Chancery, when accepted, becomes part of the record. *Gaylord v. Couch*, 4 Day's Rep. 374.

If an attorney's name appears for a party on record, it cannot be denied. 1 Tyl. Rep. 304.

A record is notice to all persons whom it may concern. *Ld. Proprietary v. Jennings*, 1 Har. & M'Hen. Rep. 145.

An evident mistake of the clerk in making out a rule of reference, may be amended. *Tetter v. Rapenwyder*, 1 Dall. Rep. 293.

A clerical error may be amended, even in a criminal case. *Sharff v. Commonwealth*, 2 Binn. Rep. 514.

So in actions on penal Statutes. *Low qui tam. Esc. v. Little*, 17 Johns. Rep. 346.

After error brought, the Court, where the record remains, may order an amendment on proper grounds. *Prevost v. Nichols*, 4 Yeates' Rep. 479. *Berryhill v. Wells*, 5 Binn. Rep. 60.

A void writ cannot be amended. *Burk v. Barnard*, 4 Johns. Rep. 309.

A justice's return may be amended after errors assigned, argument and judgment thereon, if it appear by affidavit to be a clerical mistake. *Day v. Wilber*, 2 Caines' Rep. 134. Vide *Schoonmaker v. Trans*, 2 Do. 110. *Moore v. Bacon*, 3 Do. 83. Sed vide *Foot v. Cady*, 1 Root. Rep. 178.

A *ca. sa.* on which defendant was taken, was allowed to be amended by adding the *testatum* clause. *M'Intire v. Rowan*, 3 Johns. Rep. 144. *Bronson et al. v. Earl*, 17 Do. 63.

A clerical error may be amended. *Gordon v. Frazier et al.* 2 Wash. Rep. 168. Vide *Wren v. Thompson et al.* 4 Munf. Rep. 377. *Gano v. Slaughter*, *Hurd. Rep.* 76. *M'Clelland v. Commonwealth*, *ibid.* 290. *Adams v. Bradshaw*, *ibid.* 555.

If an entry has been made by mistake, on the record, on motion, the Court will correct it. *Marr's adms. v. Miller's exrs.* 1 Hen. & Munf. Rep. 204.—Am. Ed.

* *Letters patent* being under the great seal are also matters of record, and are therefore read without further proof; and by Stat. 3 & 4 Edw. 6, c. 4, and 13 Eliz. c. 6, patentees, and all claiming under them, may make title, by shewing the exemplification or constat of the roll. These Statutes have been held to extend to all the King's patents which concern lands, privilege, or other thing granted to a subject, corporation, or any other. *Page's Case*, 5 Co. Rep. 53.

(d) Where the Great Seal of a State is affixed to an exemplification of an Act of the Legislature, the attestation of a public officer is not required under the Act of 1790.

Chap. II. s. 1. 2dly. An exemplification under the seal of the Court, in which the proceedings are :
 Exemplifications and Sworn Copies.

Or, lastly, a copy examined with the original by a witness, and proved by him on oath. As to the mode of examination, a distinction has been taken between an examination by the witness, assisted by the officer having the custody of the original record, and an examination between two strangers. In the former case it is sufficient for the witness to prove that the paper offered in evidence agrees with what the officer read as the contents of the record ; but in the other case, the two persons examining should change papers and read them alternately, so that the witness may be certain that the original was truly read to him, which the Court will not presume to be the case, when the person reading was a mere stranger, and not in the performance of any duty cast upon him by his office.

Rolfe v. Dort,
 2 Taunt. 52.

Tidd's Pract.
 690, 3d edit.

An exemplification under the great seal is the only evidence where the record itself is put in issue, by a plea of a *nul tiel record* in another Court equal or inferior to that which gave the judgment ; but if the record be put in issue in an action depending in a Court superior to that in which it is, the superior Court may itself issue a *certiorari* to the inferior Court to certify it : and if a record of the same Court be denied, the record itself is inspected by the Judges.(e) When the record, being merely inducement to the action, forms a part only of the evidence to the jury, the examined copy is considered as sufficient evidence of it ; but no copy of that so examined, however authenticated, is admitted ; for if the party has the first copy, and by oath, or otherwise, proves that to be a true copy, then the second is useless, and if only that is produced, then the first

Gillb. Law
 Ev. 9.

U. States v. Johns, C. C. Penn. 4 Dall. Rep. 416. Et vide Church v. Hubbard, 2 Cranch's Rep. 187.

The seals of foreign municipal Courts, on the contrary must be proved by extrinsic evidence. *Delafield v. Hund, 3 Johns. Rep. 310.—AM. Ed.*

(e) Under the plea of *nul tiel record*, the defendant cannot give notice of special matter to be offered in evidence at the trial. *Raymond v. Smith, 15 Johns. Rep. 329.*

The validity of a record cannot be impeached by any allegation in the pleadings. *Green et al. v. Orington et al, 16 Johns. Rep. 55. Austin v. Rodman, 1 Ruffin's Rep. 71.*

Upon the plea of *nul tiel record*, if the record be of the same Court, a copy of it, ought not to be given in evidence, but the original ought to be produced in Court for inspection. *Burk's exrs. v. Tregg's exrs. 2 Wash. Rep. 215.*

The Supreme Judicial Court of *Massachusetts*, never direct the record of Common Pleas to be sent up on the trial of an issue of *nul tiel record* ; but receive copies of their records, attested by the Clerk in evidence, which by *immemorial usage*, is held to be evidence of the record. *Ladd v. Blunt, 4 Mass. Rep. 402.—AM. Ed.*

not being there to be sworn to, it does not appear that it is a true copy. In some cases, however, when it has been clearly shewn that a record once existed, which has been since destroyed, much inferior evidence of its contents has been admitted, especially in cases where the record is only inducement to an action. (f) Thus, in ejectment for a rectory, to which a recusant

Chap. II. s. 1.
Exemplifications and Sworn Copies.

Gill. Law
Ev. 22.

(f) The Court has a discretionary power to admit circumstantial evidence of the existence of a record. *Morris's les. v. Vanderen*, 1 Dall. Rep. 65. Et vide 2 Hayw. Rep. 76.

The loss of a record cannot be proved by a certificate of any officer, but as other facts are. *Robinson v. Clifford*, C. C. April, 1807, M. S. Rep.

A copy of a copy of a deed or decree, is not legal evidence, if the original or a copy thereof, could be had. *Whitacre v. M^r Rhenny*, 4 Munf. Rep. 510

But it is, if lost or destroyed. *Baker v. Webb*, 1 Hayw. Rep. 71. Vide *Cunningham v. Tracy*, 1 Cen. Rep. 252.

A certified copy of an ancient deed, recorded on the grantor's acknowledgment, and accompanied with possession by the grantee is evidence without proof that the original is lost or destroyed. *Rowetts v. Daniel*, 4 Munf. Rep. 473.

Where the original *Nisi Prius* record and issue roll could not be found, the plaintiff upon affidavit after a lapse of six years from the time of pronouncing judgment, was permitted to file a new *Nisi Prius* record and *postea*, to enter judgment and issue execution. *Jackson ex d. Smith v. Hammond*, 1 Caines' Rep. 496.

So where an indictment was lost, the Court gave leave to file one *nunc pro tunc*. *The People v. Burdick et al.* 3 Caines' Rep. 104. S. C. Col. & Caines' Cas. 458.

If the original writ be lost, so that it cannot be made a part of the record, the Court will intend after verdict, that it was a good writ, although some of the subsequent process be erroneous. *Tuberville v. Long*, 3 Ben. & Munf. Rep. 309.

In *Virginia*, under an Act of Assembly, where the records of a Court were destroyed, an imperfect minute of a judgment was admitted to record in lieu of the original. *Lyon's exr. v. Gregory*, 3 H. & Munf. Rep. 237.

A special verdict on an indictment may be amended by the Court, by inserting the technical reference to it, so as to make the facts found conform to the allegations in the indictment; unless the intention of the jury to the contrary can be inferred. *Commonwealth v. Judd et al.* 2 Mass. Rep. 329.

Evidence by a person, that he had delivered a deed to the Clerk of the county to be recorded, and that search had been made in the Clerk's office, and that it could not be found, is not sufficient evidence of the loss of a deed, to entitle a party to read a copy in evidence, unless it be shewn that the deed never was re-delivered by the Clerk. *Jackson ex d. Dunbar et al. v. Todd*, 3 Johns. Rep. 207.

Et vide *Jackson ex d. Livingston et al. v. Neely*, 10 Johns. Rep. 374.

The certificate of a clerk, stating the loss of a record, will not be sufficient evidence of the fact; it must be proved by the oath of a witness. *Wilcox v. Ray*, 1 Hayw. Rep. 410.

If it be shewn that a will cannot be found, a record of the probate in the book of the Judge of the Court of Probates is evidence. *Jackson ex d. Dunbar v. Lucett*, 2 Caine's Rep. 363.

The copy of a grant from the records, certified by the Secretary of the State, &c. is sufficient to shew that a grant once existed; and length of time and a state of war are strong grounds to raise a presumption of its loss or destruction. *Rochell v. Holmes*, 2 Bay's Rep. 487.

A new *Nisi Prius* record was allowed to be filed, and a *postea* endorsed thereon according to a judgment of six years' standing, and execution thereon, upon affida-

Chap. II. s. 1. had presented, the record of his conviction being destroyed by fire, it was permitted to be proved by the estreats in the Exchequer: but in these cases, the most strong and satisfactory evidence is required; the collateral evidence should prove the same

Knight v.
Dauler, Hard.
323.

facts, as the regular evidence would, if in existence; and therefore, where the estreat and presentment were of the same assizes, it was held to be no proof of a conviction, for the Stats. 23 Eliz. c. 1, and 29 Eliz. c. 6, direct proclamation to be made at the assizes where indicted, and for the person to render himself before the next assizes, and therefore he could not be convicted at the same assizes. This species of evidence can be applicable to those cases only, where very ancient records are lost; for if a recent roll be lost, and its contents can be ascertained, the Court will permit a fresh one to be engrossed.

Douglas v.
Yallup,
2 B. & C. 722.

(1) Jones v.
Randall,
Comp. 17.

Copies of judgments must in general be stamped; (1) but it has been held, that no stamp is necessary on a copy of the minutes of a judgment in the House of Lords. (g)

(2) Gilb. Law
Ev. 14. 19.

The exemplifications or copies under seal, are considered as of higher authority than any sworn copy, for the Courts of Justice which put their seals to them, are supposed to be more capable of examining them, and more critical and exact in their examination, than any other person is, or can be; and, therefore, no other proof is necessary of such copies, than the production of them, (2) for the Courts under whose seals they are authenticated making a part of the law and constitution of the country, their seals are supposed to be already known to every person, like every other part of the law; and, for the same reason, the seal of a Court constituted by Act of Parliament, as the Great Sessions in *Wales*, or a county palatine, is, of itself, sufficient proof of the record it authenticates. (3) (h)

(3) Olive v.
Gwin,
2 Sid. 145.
Hard. 118.
S. C.

vit shewing the probable loss of the originals. *Jackson ex d. Smith v. Hammond*, 1 *Caine's Rep.* 496.

A *feri facias*, after levy upon it, having been accidentally burnt in the house of a deputy sheriff, the Court ordered a new one made out and delivered to him. *White v. Lovejoy*, 3 *Johns. Rep.* 448.

Where it was proved that the records of the clerk's office had been almost entirely burnt, and that the few which remained were in a mutilated state, the Court admitted the journals of the Court in evidence, to prove that an action had been commenced and abated by the death of the plaintiff. *Cook v. Wood*, 1 *M' Cord's Rep.* 139.—*AM. Ed.*

(g) To make the certificate of a Judge, authenticating a judgment in another State, evidence under the Act of Congress of 1797, it was not necessary that it should have been stamped. *Frey v. Wells*, 4 *Yeates' Rep.* 396.—*AM. Ed.*

(h) On a trial by record of an action brought on a judgment in the Circuit Court of the United States for *Massachusetts*, office copies were admitted in evidence. *Jenkins v. Kinsley*, Col. & *Caine's Cas.* 136.

Something similar to exemplifications under the seal of a Court, are what are denominated *office copies* of its proceedings, granted out and authenticated by an officer appointed by the law for that purpose. There are, however, but few instances in which an officer is so entrusted, and though in cases where he is, the law, on account of the confidence reposed in him, receives his copy without further evidence; yet, where that trust does not form part of the duty of his office, his certificate is no more than that of any other private person, and gives the copy certified no credit whatever.

Thus, though in every instance, where any copy of a proceeding is granted out by an officer of the Court, as copies of proceedings in Chancery, in the Crown Office, &c. it is commonly called an *office copy*, and such copy is, for the sake of convenience, permitted to be read in any part of the same cause; it is not legally evidence before any other Court. The *office copies* of the bill answer, and depositions are read in the Court of Chancery without further proof; but at common law they are no evidence, unless examined and proved, because the officer is not entrusted by the law to authenticate such copy.⁽ⁱ⁾ The chirograph of a fine, or the endorsement on a deed by the proper officer, of its having been enrolled, are good evidence of the fine having passed, or the deed having been enrolled, without proving them examined; for the officer is appointed by law to give out the copies in the one instance, and the certificate in the other. So an endorsement of a deed having been enrolled by the auditor of the Duchy of Lancaster, pursuant to a clause in the deed is good evidence of the enrolment. But an endorsement on the fine, by the same officer who made out the chirograph, that proclamations had been made, is no evidence of such proclamations; because, though the chirographer is authorised to make copies of the agreement filed of record for the parties, yet the Statute which gives that authority, does not appoint him to copy the proclamations. To prove these, therefore, the copy must be examined with the record, and proved as in other

Chap. II. s. 1.
Proof by Office Copies.

Gillb. Law Ev.
24 to 26.
Bul. N.P. 229.

Kinnerly v.
Orpe, Doug.
56.

Gillb. Law Ev.
Bul. N. P.
ut supra.

Certified office copies, when admissible, instead of exemplification of the record. Vide *Jenkins v. Kinsley*, *Colem. Cas.* 137. *Vickery v. M'Knight*, 4 *Binn. Rep.* 209.

A record under the seal of the Court being the highest evidence, must be produced in preference to any other testimony. *Thompson v. Bullock*, 1 *Bay's Rep.* 336.—*AM. Ed.*

(i) They are admitted at *Nisi Prius*. *Hennell v. Lyon adm.* 1 *Barn. & M. Rep.* 182.—*AM. Ed.*

Chap. II. s. 1. cases. (k) So a copy of a judgment, made by the Clerk of the Office Copies.

Treasury, must, nevertheless, be examined with the original record; and if a deed be lost,* and a copy made out from the enrolment, and offered to a jury as the next best evidence the case will admit of, it should be examined with the enrolment, and proved by a witness: for though the Stat. 26 Hen. 8, c. 16, authorises the clerk to certify the enrolment, he is not entrusted to give out copies. The clerk of the rules is appointed to make out the rules of the Court, and authenticate them, and therefore a rule produced under his hand, is sufficient without proving it

(1) *Selby v. Harris*, 1 Lord Raym. 745. examined with the entry in the books: (1) and in like manner a copy of depositions sworn at a Judge's chambers, delivered out by the Judge's Clerk, and attested by his signature, is sufficient

(2) *Duncan v. Scott*, 1 Campb. 101. without examination with the original deposition. (2) But where the examination of a soldier had been taken by two magistrates, touching his settlement, it was held that the signatures of the magistrates should be proved, notwithstanding the mutiny Act makes such examination evidence of his settlement. (3) (l)

(3) *Rex v. Bolton*, with Harrowgate, 1 East 13. It is in general, a rule, that before exemplifications, or other copies of records, are made, the record should be drawn up in form, for though by the practice of the Courts at Westminster, the party may take out an execution immediately the judgment paper is signed by the officer of the Court; yet it is not a perfect and permanent record till brought into Court, and there filed as a memorandum or roll: till that is done it is transferable to any place, and so does not come within the reason of the law, which permits a copy to be given in evidence. (4) But when, by the practice of the Court, the minutes are considered as the judgment itself, and it is not usual to make any further entry, copies of such minutes may be given in evidence, as is always done in the case of minutes in the House of Lords of the judgment given by them on an appeal from the Court of Chancery. (5) (m)

(4) *Gilb. Law Ev.* 22. (5) *Jones v. Randall*, Cowp. 17.

(k) When an instrument must be recorded in order to be valid, a copy certified by the Register is sufficient evidence. *Yarborough v. Beard*, *Tayl. Rep.* 25.

Vide post Chap. II. sec. 4.—AM. ED.

• Vide post.

(l) Where one party serves copies of affidavits on another, the originals of which are on file, he cannot afterwards object to the copies being read in evidence by the party on whom they were served, but they are to be considered as equivalent to office copies. *Jackson ex d. Wood v. Harrow*, 11 Johns. Rep. 434.—AM. ED.

(m) To make a record conclusive evidence, and to give it "full faith and credit" in *Pennsylvania*, it must be authenticated according to the Act of Congress, 26th

The record being so completed, the whole, and not a part only, must be exemplified or copied, in order that the Court may be in possession of the full effect of it; for a partial extract may bear a very different import from the whole taken together: (1) but in cases of public concern, such as the minister's return to the commission in *Henry* the Eighth's time to inquire into the value of livings, so much as relates to the particular matter in dispute is sufficient, without proving the commission. (2) (n)

Having thus shewn how a record is to be proved, the next object of inquiry will be, against whom it is evidence, and to what extent. It is an established rule of law, that a fact which has once been directly decided shall not be again disputed between the same parties; and therefore a judgment of the same Court, or one of concurrent jurisdiction, whether upon verdict, demurrer, or by default, if *directly* upon the point, may be pleaded

Chap. II. s. 1.
The whole must be copied.

(1) 3 Inst. 175.
Gilb. Law Ev. 17. 23.

Against whom a record in a civil suit is evidence, and its effect.

(2) Per Hardw. C. in *Sir Hugh Smithson's case*, vide *Bul. N. P.* 328.

May, 1790, (*Ing. Dig.* 76) but a copy of a record otherwise certified may be received as *prima facie* evidence. *Baker et al. v. Field*, 2 *Yeates' Rep.* 532. *Raston v. Cummins*, cited, *ibid.* Sed contra, *Drummond's adms. v. Magruder & Co. et al.* 9 *Cranch's Rep.* 125.

But the record of a Court of the *United States* is not within the Act of Congress. *Jenkins v. Kinaley, Col. & Caines' Cas.* 136. *Pepoon v. Jenkins*, 2 *Johns. Cas.* 119.

To make a record of one State evidence in another, the attestation must not be according to the form used in the State where it is offered, but to that of the State or of the Court whence the record comes; and the only evidence of this fact is the certificate of the presiding Judge of that Court. *Craig v. Brown*, 1 *Peters' Rep.* 352. The attestation must be certified by the presiding Judge. *Smith v. Blagge*, 1 *Johns. Cas.* 238.

Whenever the Court, whose record is certified, has no seal, this fact should appear either in the certificate of the Clerk or that of the Judge. *Craig v. Brown*, 1 *Peters' Rep.* 352. Et vide *Alston v. Taylor*, *Hayw. Rep.* 395.

The attestation by the clerk of the record of a judgment in another State, must have the seal of the Court annexed to it, and it is not sufficient that the seal of the Court is annexed to the certificate of the Judge. *Turner v. Waddington*, *C. C.* Oct. 1811, *M. S. Rep.*

A record informally certified cannot be read on a question of discharging on common bail. *Craig v. Brown*, 1 *Peters' Rep.* 352.

The record of a will under the Statute in *New York* is not conclusive upon the heirs—they may impeach its validity. *Jackson ex Woodhull v. Rumsey*, 3 *Johns. Cas.* 234.—AM. Ed.

(n) If part of a record is produced to prove a fact, and is deficient, it cannot be helped out by evidence *dehors* the record; but the whole record must be produced. *See of James v. Stockey et al.* *C. C. Jan.* 1806, *M. S. Rep.*

Short minutes of *proceedings* in the Court, but not appearing to be a record of the whole, nor certified by the Clerk to be a copy of any part of the record, is not evidence. *Barton v. Commonwealth*, *Sup. Ct. April*, 1814, *M. S.* Et vide *Ferguson v. Harwood*, 7 *Cranch. Rep.* 412.

An execution out of Chancery refused to be allowed in evidence, unless the original decree should be produced on which the execution was founded. *Wilson v. Cennine*, 2 *Johns. Rep.* 280.—AM. Ed.

Chap. II. s. 1. in bar in cases where special pleading is required, and in other cases given in evidence on the general issue,* as *conclusive* between the parties upon the same matter coming either directly or incidentally in question. (1) (o)

(1) Vide 11 St. Tr. 261.

* In *Voeght v. Winch*, 2 Barn. & Ald. 662, the Court held that to make a former verdict conclusive in any case, it should be pleaded by way of estoppel, and that if not so pleaded it could only be left to the jury as evidence, but not as conclusive of the right. To this decision, however, may be opposed the cases of *Hitchen v. Campbell*, 2 Black. 827; 3 Wils. 304. S. C.; *Budd v. Randall*, 3 Burr. 1553; and *Scott v. Shearman*, 2 Black. 977, which are stated in the following pages. It is also to be observed that according to the cases of *Sir Fred. Evelyn v. Haynes*, 3 East. 36, and *Miles v. Rose*, 5 Taunt. 705, the judgment in the above case would not have been conclusive if pleaded; being only a verdict on the general issue in an action on the case, when the question of right was never pointedly put in issue. In most of the cases cited, *post*. the judgments which were held to be conclusive were not pleaded.

(o) The decision of a Court of competent jurisdiction is conclusive where the same point comes directly or collaterally again in controversy. *Les. of Wright v. Decklyne*, 1 Peters' Rep. 202. *Hopkins v. Lee*, 6 Wheat. Rep. 109. Vide *Harris v. Richards*, 2 Gallis. Rep. 220. *Overton's les. v. Lackey et al.*, *Cooke's Rep.* 193.

But it should appear from the record that such point was in issue. *Manny v. Harris*, 2 Johns. Rep. 24. Et vide *Shelton v. Barbour*, 2 Wash. Rep. 64.

But it may be opposed by fraud or subsequent payments. *Buford v. Buford*, 4 Munf. Rep. 241.

A discharge by a Court of competent jurisdiction of a person as a poor insolvent debtor, under the Bread Act, cannot be impeached in a collateral way, by proof that at the time of his discharge, he was in possession of a sufficient sum of money to pay the debt for which he was confined. *McKinney v. Crawford*, 8 Serg. & R. Rep. 351.

The record of a judgment against *James R.* was admitted as evidence against *Joseph R.* it appearing that the latter was in fact the party to the suit, and defended it. *Stevell v. Reed*, C. C. Oct. 1808, *M. S. Rep.*

An order of the Sessions on a dispute between two townships, respecting a pauper, is conclusive upon a new township, subsequently created by a division of one of them. *Gibson v. Clifford*, 2 Serg. & R. Rep. 422.

Where several suits had been instituted on a policy of insurance, and an agreement signed by all the underwriters, to be bound by one verdict, it was ruled that a special verdict given in that action might be read in evidence in a suit against another of the underwriters, though not as conclusive. *Patton v. Caldwell*, 1 Dall. Rep. 419.

If the matter in dispute, in an action at Law in one State, has been decreed in Equity in another, the decree is conclusive. *Montford v. Hunt*, C. C. Penn. April, 1811, *M. S. Rep.*

But a decree in Chancery, dismissing a bill between the same parties, and on the same matter, is not conclusive in a Court of Law. *Les. of Wright v. Decklyne*, 1 Peters' Rep. 199.

A former verdict in the same case, which had been set aside by the Court, is not evidence. *Ridgeley v. Spencer*, 2 Binn. Rep. 70.

So a verdict in a former action of ejectment, where it was reversed for error in fact, is not evidence in a subsequent action. *Richardson's les. v. Parsons*, 1 Har. & Johns. Rep. 235.

A judgment reversed, is a mere nullity, and no inference of law can arise from it. *Green v. Stone*, *ibid.* 405.

Thus a judgment for the recovery of a debt is conclusive evidence of its existence against the party to such judgment and his representatives; and a man who, on being sued, gives a cog-
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Civil Actions.

But a verdict in a former ejectment, on which no judgment has been entered, may be given in evidence, if defendant has acquiesced in it by payment of costs and delivery of possession. *Shaeffer v. Kretzner*, 6 *Binn. Rep.* 430.

A verdict for the same cause, and between the same parties, is evidence, although no judgment has been entered. *Felter v. Mulliner*, 2 *Johns. Rep.* 181.

A verdict without judgment thereon, cannot be given in evidence. *Donaldson v. Jude*, 2 *Bibb's Rep.* 60.

A verdict between the same plaintiff, and different defendant, for the same land, is not evidence, although offered by defendant. *Hurst v. McNeil*, C. C. April, 1804, *M. S. Rep.*

A case made between the assurers and assured, in an action on a policy of insurance, will not be received in evidence in another suit in which the parties are different, though it relates to the same subject or policy. *Etting v. Scott*, 2 *Johns. Rep.* 157.

A decree in one case, cannot be used as a defence in another, when the subject matter is distinct and independent. *Lyon et al. v. Tallmadge et al.* 14 *Johns. Rep.* 501.

A verdict against the Sheriff for the default of his deputy, is evidence in an action by the Sheriff against the deputy. *Tyler v. Ulmer*, 12 *Mass. Rep.* 163.

A verdict in an action by the grantee in a deed, against one who does not claim to hold under the grantor, is not evidence in an action by the grantee against the grantor for a breach of his covenant, that he had good title to convey. *Twamby v. Henley*, 4 *Mass. Rep.* 441.

In an action of covenant against the warrantor in a deed for land, the judgment of recovery against the grantee, with notice of the suit to the warrantor, is evidence. *Hamilton v. Cutts et al.* 4 *Mass. Rep.* 349.

Verdicts and judgments are evidence between parties and privies only. *Wood v. Davis*, 7 *Cranch's Rep.* 271. *Davis v. Wood*, 1 *Wheat. Rep.* 6. *Jackson ex. d. Schuyler et. al. v. Vedder*, 3 *Johns. Rep.* 8. *Paynes v. Coles et al.* 1 *Munf. Rep.* 373. Et vide *Jackson ex. d. Newcomb v. Smith*, 9 *Johns. Rep.* 100. *Jackson ex. d. McDonald v. McCall*, 10 *Do.* 377. *Kiddle v. Debinz*, 1 *Hayw. Rep.* 490. *Cowles v. Harris et al.* 3 *Con. Rep.* 516.

So if the same points are in question, though the lands or other things are not the same. *Preston v. Hardy*, 2 *H. & Munf. Rep.* 55. Et vide *Chapman v. Chapman*, 1 *Munf. Rep.* 398.

An action will not lie before one justice, to recover back the amount of a fine imposed on a witness, by another justice, for a contempt in a suit before him. *Moor v. Ames*, 3 *Caines' Rep.* 170.

In an action by the vendee of a chattel against the vendor, on the implied warranty of title, the record in a previous action, in which the vendee was evicted, and to the pendency of which the vendor had notice, is evidence. *Blasdale v. Babcock*, 1 *Johns. Rep.* 517. *Garland's exrs. v. Goodloe's adm.* 2 *Hayw. Rep.* 351. Et vide *Clark v. Carrington*, 7 *Cranch. Rep.* 306.

Where a Sheriff who had taken bond with sureties, for the liberties of the jail granted to a prisoner in execution, was sued for an escape, of which suit the sureties had notice, and a judgment was recovered against him; in an action by the Sheriff on the bond against the prisoner's sureties, it was held, that the former judgment was conclusive. *Kip v. Brigham*, 7 *Johns. Rep.* 168.

Chap. II. s. 1. *novit* for the debt,(1) or pays money into Court,(2) or suffers judgment by default, will not afterwards be permitted to recover back the money, though he can shew, by the clearest evidence,

(1) Marriot
v. Hampton,
7 T. Rep. 269.

The record of proceedings on a writ of *ad quod damnum*, are conclusive evidence against all persons who were parties thereto, until they are reversed. *Sanders v. M^o Cracken*, *Hardin's Rep.* 260.

(2) Vaughan
v. Barnes,
3 Bos. & Pull.
392.

In an action brought against the warrantor, the record of eviction was held to be conclusive, on a breach of the covenant. *Radcliff v. Ship*, *Hardin's Rep.* 293.

In *Connecticut*, in the case of *Lane v. Cook*, 3 *Day's Rep.* 255, it was decided that a record stating that the defendant in an action of book debt, appeared and pleaded that he owed the plaintiff nothing, but that the plaintiff owed him, and judgment that the parties were fully heard thereon, is conclusive against him in another action.

A confession of judgment by the endorser of a promissory note is evidence, but not conclusive, of notice of demand on the drawer, and refusal by him to pay the note, or waiver of such notice; but it may be rebutted and explained by the circumstances under which the confession was made. *Richter v. Selin*, 8 *Serg. & R. Rep.* 425.

The validity of a record cannot be impeached by any allegation in the pleadings. *Green et al. v. Orvington et al.* 16 *Johns. Rep.* 55.

The record of a voluntary confession before a justice, and the payment of the whole penalty, may be pleaded in bar to a *quid tam* action. *Hamilton v. Williams*, 1 *Tyl. Rep.* 15.

In an action against the Sheriff for an escape, he gave notice of the suit to the prisoner's sureties, who, in conjunction with the Sheriff, defended it, and judgment was given against the Sheriff in an action by the Sheriff against the sureties, on the bond for his indemnity, the former judgment is conclusive evidence, and the defendants cannot controvert the fact of the escape. *Kip v. Brigham et al.* 6 *Johns. Rep.* 158. *S. C.* 7 *Do.* 168.

The same cause of action is where the same evidence will support both actions. *Rice v. King*, 7 *Johns. Rep.* 20. *S. P. Johnson v. Smith*, 8 *Do.* 343.

A plea of former recovery and satisfaction, necessarily contains matter of fact and record, and may conclude to the country. *Thomas v. Rumsey*, 6 *Johns. Rep.* 26.

The record of the verdict and judgment, upon a writ of inquiry, in a suit by the mother of the plaintiff against a third person, in which record the ground of the judgment does not appear, may be given in evidence to prove that the mother had recovered her freedom. But the questions, upon what ground the judgment in that suit was rendered, and whether the defendant was born after her mother acquired her right to freedom, or not, ought to be left open. *Pegram v. Isabell*, 2 *H. & Munf. Rep.* 193.

In *Young et al. v. Black*, 7 *Cranch. Rep.* 565, it was given in evidence under the general issue.

But in *Voeght v. Winch*, 2 *Barn. & Ald.* 662, it was held, that the verdict and judgment for the defendant in the former action, was not conclusive evidence against the plaintiff upon the plea of *not guilty*. See vide *Preston v. Harvey*, 2 *Hen. & Munf. Rep.* 55. *Shelton v. Barber*, 2 *Wash. Rep.* 64. *Church v. Leavenworth*, 4 *Day's Rep.* 274. *Ryer v. Atwater*, *ibid.* 431. *The Town of Canaan v. Green Woods Turn. Co.* 1 *Con. Rep.* 1.

In *Ryer v. Atwater*, 4 *Day's Rep.* 431, SWIFT J. says, that where there are several distinct facts contested between the parties, there is no authority to warrant the admission of a verdict to prove one of the several facts in issue.

When underwriters agree to be bound by a verdict against a different underwriter, on the same policy, the verdict then may be given in evidence against them. *Paston v. Caldwell*, 1 *Dall. Rep.* 419.

that he has paid it before : (p) and even if no judgment be signed, or formal act done in consequence, but a party on being sued, (1) or a tenant when distrained on, (2) pays the money demanded of him, protesting at the same time that it is not due ;

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(1) *Brown v. M'Kinally*, 1 Esp. Cas. 279.

On the trial of a suit in 1791, the defendant was allowed to give in evidence the record of a trial, verdict and judgment, between the same parties in 1775. *Leach v. Armitage*, 2 Dall. Rep. 125

(2) *Knibbs v. Hall*, 1 Esp. Cas. 24.

Where the parties are really, though not nominally the same in both suits, as where one suit is in the name of the trustee, and the other in that of the person beneficially interested, it has been held, that the record in the first cause was evidence in the second. *Calhoun's les. v. Dunning*, 4 Dall. Rep. 190.

Although the defendant in possession gives up the premises in an ejectment, and afterwards the plaintiff recovers judgment, the judgment is conclusive against such third person. *Jackson v. Stone*, 13 Johns. Rep. 447.

In an action for mesne profits, the record of the judgment in ejectment is conclusive evidence that the defendant was in possession at the time the ejectment was brought, and also as to title during the whole time laid in the demise ; but it is not evidence of the length of time that defendant was in possession. *Bailey et al. v. Fairplay*, 6 Binn. Rep. 450. Vide *Jackson v. Haviland*, 13 Johns. Rep. 229.—*AN. ED.*

(p) If a judgment is conclusive in the Courts of the State, where it is obtained, it is conclusive in every other State, District, and Territory in the *U. States*; and the plea of *nil debet* is not good to an action upon such judgment, in a Court of another State. *Mills v. Duryee*, 7 Cranch's Rep. 483. *Hampton v. M'Connell*, 3 Wheat. Rep. 234. Et vide *Rogers v. Coleman et ux.* *Hardin's Rep.* 413. *Clark's exr.* *v. Carrington*, 6 Cranch's Rep. 308. *Buford v. Buford*, 4 Munf. Rep. 241. *Green v. Sarmiento*, 1 Peter's Rep. 74.

In an action for a malicious prosecution in a foreign country, it is not indispensably necessary to produce a copy of the record of the proceedings there, but the plaintiff may prove them *abunde*. *Young v. Gregory*, 3 Cull's Rep. 446.

Where a party applied in the first instance to a *Court of Law*, to allow the set-off, and that Court, after a full consideration of all the circumstances of the case, refused to allow it, *Chancery* refused to sustain a bill filed for an injunction and a set-off. *Simpson v. Hart*, 1 Johns. Cha. Cas. 91. Et vide *Le Guen v. Gouverneur*, 1 Johns. Cas. in Er. 436. *Cobb v. Curtis*, 8 Johns. Rep. 470. *White v. Ward et al.* 9 Do. 232. *Moore v. Ames*, 3 Caines' Rep. 170.

But a verdict in a *Court of Law*, against a party, is no bar to a defence in his favour, if he be brought into *Chancery* by the adverse party ; otherwise if he were the plaintiff in Equity. *Jones v. Jones*, 4 H. & Munf. Rep. 447.

If the party prosecute his action at law, and there be a decision of an inferior Court against him, from which he takes an appeal, but does not prosecute it, he can not come into equity for relief, for the same subject matter. *Saunders v. Marshall*, 4 H. & Munf. Rep. 455.

Matter which would have been a good defence in an action by *A.* against *B.* cannot afterwards be made the subject of a suit by *B.* against *A.* *White v. Ward et al.* 9 Johns. Rep. 232. Vide *Jones v. Scriven*, 8 Do. 453.

Money paid under an award, cannot be recovered back in an action for money had and received. *Buckley v. Stewart*, 1 Day's Rep. 150.

An action on the case will not lie for obtaining order by false and forged evidence, such decree being still in force. *Peck v. Womburgh*, 3 Day's Rep. 30.

So where an action was brought in *New York*, for suborning a witness to swear

Chap. II. s. 1. still the law will not permit him to recover back money so paid in the course of a legal proceeding. It was indeed held in one Civil Action.

case, (1) that where money had been recovered against conscience in a Court *not of record*, an action as for money had and received might be brought to recover it back; but the authority of this case has been since much questioned. (2)

(1) *Moses v. Maestrian*, 2 Barr. 1009.
(2) Vide 2 H. Black. 414
7 T. Rep. 269.

falsely in a cause in *Connecticut*, whereby judgment was given against him, contrary to the justice of the case, it was held that the action would not lie. Different reasons were given by the Judges for their decisions. *Smith v. Lewis*, 3 Johns. Rep. 157.

Foreign judgments are never re-examined, unless the aid of our Courts is asked to carry them into effect, by a direct suit upon the judgment, *ibid*.

The record of a judgment in one State is not only evidence that the judgment was rendered, but conclusive evidence of the right which it has decided. *Green v. Sarmiento*, 1 Peters' Rep. 74. *Field v. Gibbs et al.* *ibid*. 155. *Pepoon v. Jenkins*, 2 Johns. Cas. 119. *Rush v. Cobbett*, 2 Do. 256. *Blasdale v. Babcock*, 1 Johns. Rep. 517. *Kip v. Brigham et al.* 6 Johns. Rep. 158. *S. C.* 7 Do. 168. *Cromwell v. Byrne*, 9 Do. 287.

Quere, If from the record it appears that defendant had no opportunity to make a defence. 1 Peters' Rep. 83. But if defendant was noticed, and the Court had jurisdiction, it is conclusive: *Borden v. Fitch*, 15 Johns. Rep. 121.

Sed contra, *Bartlett v. Knight*, 1 Mass. Rep. 401. *Buttrick et ux. Esc. v. Allen*, 8 Do. 273. *Bissell v. Briggs*, 9 Do. 462. *Tilton v. Gordon*, *Adam's Rep.* 35.

The judgment of a Court of another State, is but a simple contract debt. *Hubbell v. Coudrey*, 5 Johns. Rep. 132. It is but *prima facie* evidence of a just debt. *Taylor v. Bryden*, 8 Johns. Rep. 175. *Hitchcock et al. v. Nicken*, 1 Caines' Rep. 460. *Et vide Post v. Neafie*, 3 Do. 37. *Pawling et ux. v. Wilson et al. exrs. of Bird*, 13 Johns. Rep. 192. *Kibbe v. Kibbe*, *Kirb. Rep.* 119. *Borden v. Fitch*, 15 Johns. Rep. 191.

Contra, *Carson v. Armstrong's exrs.* 2 Dall. Rep. 302. *Wright v. Towers*, 1 *Browne's Rep. appendix.* 1.

The Statute of Limitations is a good plea in bar to an action brought on a judgment obtained in *Connecticut*. *Hubbell v. Coudrey*, 5 Johns. Rep. 132.

A judgment in a Court of another State is a foreign attachment, is not conclusive evidence of the debt, in a suit between the same parties. *Phelps et al. v. Holker et al.* 1 Dall. Rep. 261. *Betts v. Death*, *Adds. Rep.* 265. *Et vide Kilburn v. Woodworth*, 5 Johns. Rep. 37. *Robinson v. Ward's exrs.* 8 Do. 86. *Et vide Fenton v. Garlick*, *ibid.* 152.

A record of a former recovery is only *prima facie* evidence, which may be repelled by shewing that the subsequent suit is for a distinct demand. *Phillips v. Berick*, 16 Johns. Rep. 157. *Et vide Young v. Black*, 7 *Cransh. Rep.* 567. *Snider v. Croy*, 2 Johns. Rep. 227. *Lawrence et al. v. Roberts*, 2 *Overton's Rep.* 236.

A person, in all cases, is concluded by a decree, sentence, or judgment of a Court of competent and exclusive jurisdiction, whether foreign or domestic, in a suit in which he was a party, in all future trials of the same question, whether it arise directly or collaterally, provided there is no contract to the contrary; and such decree, &c. is conclusive not only of the right it establishes, but of the fact which it decides. *Baxter et al. v. The N. Eng. Mar. Ins. Co.* 6 Mass. Rep. 277. *Robinson et al. v. Jones*, 8 Do. 536. *Thatcher et al. exrs. v. Gammon*, 12 Do. 268. *Smith v. Whiting*, 11 Do. 445.

In like manner, as the judgment concludes the defendant from disputing the debt, it precludes the plaintiff from recovering a larger sum of money than has been awarded him; and therefore if a plaintiff claiming a debt composed of different items, attempt to prove the whole, and fail as to part of it, he will not be permitted at a future time, when possessed of better evidence, to recover that part: but the defendant may plead the judgment in bar, and it will be *conclusive* evidence for him.^(g) But if the plaintiff never attempted to give this part of his demand in evidence he will not be estopped by the record, from proving that fact, and recovering the remainder of his debt; though the declaration in the first action contained counts adapted to that part of his demand.^{(1)(r)}

(g) Seddon v. Tutop,
6 T. Rep. 607.

A decision of a Court of competent jurisdiction being *res judicata*, is conclusive and binding on all other Courts of concurrent jurisdiction. *Simpson v. Hart*, 1 Johns. Cha. Rep. 91.

But if a person resides in another State, when a suit is instituted there, and he have notice, and the Court jurisdiction, a judgment in such suit will be conclusive against him, in the Courts of any other State. *Jacobs v. Hall*, 12 Mass. Rep. 25.—AM. ED.

(g) Where a former recovery has been had in a suit in which the plaintiff counted for an entire sum, the record is a complete bar to another suit brought on the same contract, to recover a sum included in the narr. of the first suit, and the plaintiff will not be permitted to prove that no evidence was given to the former jury in support of the latter claim. *Hess's exr. v. Hebble*, 6 Serg. & R. Rep. 57. Et vide *Breckway v. Kinney*, 2 Johns. Rep. 210. *Platner v. Best*, 11 Do. 530. *Irwin v. Knox*, 10 Do. 365. *Jackson ex. d. Van Allen v. Ambler*, 14 Do. 96. *Phillips v. Berrick*, 16 Do. 136.

If a record be lost, its contents may be proved by parol. *Wilcox v. Wray*, 1 Bayw. Rep. 410.

A verdict or judgment at Law against the plaintiff, is no bar to his remedy in Equity, for the same cause of action, it not appearing that the merits of the case were fully and fairly tried at law, and the case stated in the bills and supported by proof, being such as to entitle him to equitable relief. *Hawkins v. Deprient*, 4 Munf. Rep. 469. Et vide *Simpson v. Hart*, 1 Johns. Cha. Rep. 91.

A person not a party to a judgment, is not bound by it, in law or equity, merely on the ground that he was present and cross examined the witnesses. *Turpin v. Thomas*, 2 H. & Munf. Rep. 139.

A recovery will not affect the rights of others not parties to the suit. *Newby v. Blakely*, 3 H. & Munf. Rep. 57.—AM. ED.

(r) So if in a former action the plaintiff joined two trespasses in the same count, and on motion, the Court compelled him to elect for which trespass he would proceed, and prohibited his going for both, and a verdict was found for him, it will not be a bar to a subsequent action, brought for the trespass, which he was obliged to abandon. *Snider et. al. v. Croy*, 2 Johns. Rep. 227. Vide the remarks, of GIBSON J. on this case in *Hess's exrs. v. Hebble*, 6 Serg. & R. Rep. 60.

But if the plaintiff's demand is indivisible in its nature, several suits cannot be maintained. *Farrington et. al. v. Payne*, 15 Johns. Rep. 432. Et vide *Smith v. Jones*, *ibid.* 229.

Chap. II. s. 1. When a judgment as to personal property is given for the defendant on the merits of the case, it precludes the plaintiff from making a fresh demand, either in the same form of action, or in any other of equal degree: and therefore where *A.* brought an action of *trover* to recover personal property, and a verdict was given against him on the merits, this verdict was held to be *conclusive* evidence in an action of *assumpsit* by him for money had and received, to recover the money produced by the goods; (1)

(1) *Hitchen v. Campbell*, 2 Black. 827.

(2) *Ferrari's case*, 6 Co. 7. *Ferrari v. Arden*, Cro. Eliz. 668, 8. C.

(3) *Leeshmere v. Toplady*, 2 Vent. 169.

for though a different form of action it was still one of the same degree, it was the same question of property, and the judgment was directly on the point. So where to an action of *trespass* the defendant pleads to the merits, and on *demurrer* to the plea, judgment is given for him; this operates as a bar to an action of *trover* for the same taking, and may be pleaded to such action, (2) or, perhaps, according to the modern rules of pleading in that action, given in evidence on the general issue. (3) But had the first action failed through any error or misconception of the form of action, or misprison in the pleadings, then the judgment would not have barred the subsequent action; (3) but the plaintiff might, in case it had been specially pleaded, have traversed the averment of the cause of action being the same. (4)

The cases above referred to arose on questions respecting *personal* property, but the same rule holds in actions which concern

As where several actions of *trover* were brought for the tortious taking of several articles at the same time, and by one act several suits cannot be maintained. *Philips v. Berrick*, 16 Johns. Rep. 136.

But a recovery by the plaintiff in a former action, apparently for the same cause, is *prima facie* evidence that the demand had been tried, but not conclusive, and the plaintiff may shew that it was a different one. *ibid.* Et vide *De Long v. Stanton*, 9 Johns. Rep. 38. *Wheeler v. Van Houton*, 12 Do. 311.

Where a debt was rejected as a set-off, on the ground of its not being due, it was held, no bar to a subsequent suit. *Bull v. Hopkins*, 7 Johns. Rep. 22.

A judgment for the defendant, upon pleadings not going to the *foundation* of the action, is no bar to the plaintiff's bringing another. *Lane v. Harrison*, 6 Munf. Rep. 573.—AM. Ed.

(5) A verdict in *trespass de bonis asportatis*, is a bar to an action of *assumpsit* for the price of the same goods. *Rice v. King*, 7 Johns. Rep. 20.

A judgment against one of two joint trespassers, without satisfaction, is not a bar to an action against his co-trespasser, for the same trespass. *Sheldon v. Kibbe*, 3 Con. Rep. 214.

A recovery in *trespass* is not a bar to an action of *detinue*, unless the damages in trespass were given for the property. *Belch v. Holloman*, 2 Hayw. Rep. 328.—AM. Ed.

(6) A judgment on a non-suit, before verdict, is no bar to another action for the same cause. *Morgan et al. v. Bliss*, 2 Mass. Rep. 113.—AM. Ed.

real estates. If a dispute arise respecting lands, and any fact come *directly* in issue, the finding of a jury on that fact is received as evidence of it in any future dispute between the same parties or others claiming under them, though in respect of other lands ;(1) and if in an action of trespass, the right to an easement in land, or to any part of the land itself, be put on the record, traversed, and found against the party pleading it, such finding is *conclusive* against the right, and if the same plea be pleaded to another action, may be replied by way of estoppel.(2) (u) But though a judgment in one action is *conclusive*

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(1) *Lewis v. Clarges*, G. L. E. 39. Bul. N. P. 232, S. C. called *Sherwin v. Clarges*.

(u) Where the defendant in ejectment claimed title from the person whose land was bought by the plaintiff at a Sheriff's sale, the defendant is estopped to deny the title of such person. *Murphy v. Barnett*, 1 *Car. Law. Repes.* 106.

An instrument not under seal, cannot be pleaded by way of *estoppel*. *Davis v. Tyler*, 18 *Johns. Rep.* 490. (2) *Outram v. Morewood*, 3 *East*, 346.

If a grantor, after executing a deed of conveyance, receives other titles to the estate, he and his heirs are estopped by the first deed. *Masse et al. v. Sebastian et al.* 4 *Bibb's Rep.* 436.

A deed executed by husband and wife, with covenant and warranty, does not stop the wife, in an action of ejectment against her, after the death of her husband, from setting up a subsequently acquired interest in the same lands. *Jackson ex d. Clowes v. Vanderheyden*, 17 *Johns. Rep.* 167.

A person under whose privy and direction a Marshal's sale is made, is estopped from controverting the sale so far as relates to any interest he possessed. *Willing v. Brown*, 7 *Serg. & R. Rep.* 467.

Where the Legislature, by a public resolve, had declared that a certain monument was, and was considered, as the one mentioned and intended in an ancient *Indian* deed, under which a title was derived to certain proprietors, the Commonwealth was estopped from afterwards shewing that such monument was not the one intended in such deed. *Commonwealth v. The Pejepscut Proprietors*, 10 *Mass. Rep.* 15.

If the principal, in a letter of attorney under seal, give it a false anterior date for the purpose of legalising prior acts of the attorney, he is estopped to prove or aver that it was, in fact, executed at a subsequent period. *Mellikin v. Coombs*, 1 *Green. Rep.* 343.

A recital in a will is an estoppel to parties claiming under the will. *Denn ex d. Colden v. Cornell*, 3 *Johns. Cas.* 174.

A partition deed operates as an estoppel between the parties and persons claiming under them. *Jackson ex. d. Ostrander et al. v. Hasbrouck*, 3 *Johns. Rep.* 331.

No party is technically estopped by a conveyance under the Statute of Uses. *Jackson ex. d. Jones et al. v. Brinckerhoff*, 3 *Johns. Cas.* 101.

A stranger or third person, cannot avail himself of an *estoppel* by a mere writing or matter *in pais*. *ibid.*

One who is not bound by, cannot take advantage of, an *estoppel*. *Lansing v. Montgomery*, 2 *Johns. Rep.* 382.

If an executor or administrator confess a judgment, or suffers one by default, he is estopped from denying assets, to the extent of that judgment, as far as regards the plaintiff therein. *Ruggles et al. v. Sherman*, 14 *Johns. Rep.* 446.

By accepting a deed conveying ground, adjoining an alley and court together with the use of the alley in common with the grantor, "and his tenants and occupiers of the adjoining ground as also of his (the grantors) other ground bounding on the

Chap. II. s. 1. evidence in all others of the *same degree*, it does not operate as a bar to any other of a *higher nature* than that in which it was given (1) nor will it in any case be *conclusive*, unless the point

(1) Vide *Per-
rar's case*,
6 Co. 7.

(2) Sir Fred.
Evelyn v.
Haynes, cited
3 East, 36.
Miles v. Rose,
5 Taunt. 705,

be directly raised; and therefore the judgments in mere *possessory actions*, where the defendant pleads the general issue, and the question of *right* is never pointedly in issue, (2) as in actions for disturbance, ejectment, &c. though a degree of evidence, as to the right, are never so conclusive as to bar other actions or preclude another defence of the same nature. (x)

It must always be remembered, that it is against the party to an action, or one claiming under him only, that a judgment is evidence. (y) Against third persons, a verdict or judgment in a

said court," the grantee is estopped from denying the right of way through the alley, to the occupiers of ground adjoining the court, but not adjoining the alley; though at the time of the execution of the deed, the grantor had no right to grant a right of passage through the alley as appurtenant to ground adjoining the court, but not adjoining the alley. And although the grantor and grantee could not grant a right of way through the alley, as appurtenant to any ground not adjoining it without the consent of the owners of the land on the opposite side of the alley, yet the estoppel operates on one who, with full notice on the face of his deed, purchased land on that side of the alley of the grantee, who, after the execution of the first mentioned deed, became the owner of the land on both sides of the alley. *Ewing v. Desilver*, 8 Serg. & R. Rep. 589.

In *Eveleth v. Cranch*, 15 Mass. Rep. 307, it was decided, that a party will be estopped from saying that he acted as agent, when he covenanted in his own right. —Am. Ed.

(x) In an action of ejectment between A. and B. the record of a former judgment in an action of trespass between B. and the *cestui que trust* of A. is admissible. *Cathoun's les. v. Dunning*, 4 Dall. Rep. 150.

The record of a recovery in an ejectment against a covenantor, is not conclusive against the covenantor, if no notice has been given him. *Leather v. Poulteney*, 4 Binn. Rep. 356. Contra if the grantor had notice, and took part in the trial. *Bender v. Fromberger*, 4 Dall. Rep. 436. n.

Quere, if due notice had been given to the covenantor, it is competent to him to offer other evidence than that which was given in the ejectment, to prove that the title of the plaintiff was not derived from him. *Leather v. Poulteney*, 4 Binn. Rep. 356.

In an action for *mesne profits*, the record of the recovery in ejectment, is conclusive evidence of defendant being in possession at the time the suit was brought, but not for the length of time. *Bailey et al. v. Fairplay*, 6 Binn. Rep. 450.

In an action of warranty, the record of eviction cannot be admitted as conclusive in bar of the warrantor who was no party nor privy to the suit—it may be admitted to shew the fact of eviction. *Sanders v. Hamilton*, 2 Hays. Rep. 236. —Am. Ed.

(y) The record of a judgment in a former suit between A. and B. is inadmissible in a subsequent suit brought by C. who was not privy to such judgment, against the same defendant. *Cowles v. Harts et al.* 3 Con. Rep. 516. Et vide *Case v. Reece et al.* 2 Johns. Cha. Rep. 81. S. C. in Br. 14 Johns. Rep. 81.

A former judgment is no evidence in an action, except between the same parties or privies. *Taber v. Perret*, 3 Gall. 565. *Sanders v. Mc Cracken*, *Hardin's Rep.* 260. *Edwards v. Mc Connell*, *Cooke's Rep.* 305.

civil case, is no evidence whatever; for the first principles of natural justice require that a man should be heard before his cause is decided, and if he were to be bound, or in the least degree prejudiced by a verdict where he had no opportunity of cross-examining the witnesses, it would, in effect be overturning this most salutary rule of jurisprudence.

In general, too, the benefit of the rule is mutual; and therefore, if in a suit between *A.* and *B.* a verdict pass for *A.*, *C.* who was no party to the cause, is not permitted to give this in evidence against *B.* in any future action there may be between them; for

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Ev. 34.

And then is conclusive. *Shadburn v. Jennings*, 1 *Marsh. Rep.* 179.

A recovery against an executor for a debt due from the testator, is not evidence in an action brought against the heirs or devisees to charge the real estate, for there is no privity between the executor and the heirs or devisees, admitting that there may be between the executor and the legatee of the personality. *Mason's devisees v. Peter's adms.* 1 *Munf. Rep.* 437.

A judgment recovered by an executor, is no bar to an action brought by the administrator *de bonis non cum testamento annexo*, for the same cause. *Grant v. Chamberlain*, 4 *Mass. Rep.* 613.

A judgment in an action of *formedon in descender*, is a good bar to an action of entry *sur disseisin* for the same lands by the same demandant, against the son and heir of the tenant in the first action, if such judgment exhibit evidence that there was a trial on the merits. *Kent v. Kent*, 2 *Muss. Rep.* 338.

The record of a suit brought before a justice of the peace, which was withdrawn before judgment by the plaintiff who paid the costs, is not evidence between the same parties, to shew that the plaintiff, at the time of the institution of the suit before the magistrate, did not consider himself entitled to recover more than one hundred dollars. *Swigart v. Frey adm.* 8 *Serg. & R. Rep.* 299. Nor can the record of a suit brought against the defendant by a third person, who was one of several joint obligees in the bond upon which the principal suit was founded, be given in evidence to shew that the defendant had paid to him part of the money for which the bond was given. *ibid.*

A. the holder of a promissory note, having obtained a judgment against *B.* the drawer, assigned it to *C.* who issued an execution, upon which the defendant was committed to prison, and afterwards discharged under the Bread Act, as a poor insolvent debtor. *C.* then sued *A.* for money paid and expended on the judgment which had been assigned to him, and in this suit, *D.* the endorser of the note, became special bail. *Held*, That in an action brought by *A.* the holder, against *D.* the endorser, the record of the suit brought by *C.* against *A.* was competent evidence to shew that the endorsee knew that the note had not been paid by the drawer. *M'Kinney v. Crawford*, 8 *Serg. & R. Rep.* 351.

Where an action was brought against an attorney for the loss of the evidence of the debt, the defence was that the plaintiff had another remedy for the recovery of his debt, which he had successfully pursued, it was *held* that the record of such recovery was evidence of the fact, although the attorney was no party to it. *Huntington v. Bummill*, 3 *Day's Rep.* 390.

A stranger to a suit in which a trustee is examined, is not concluded by the examination, from proving that there were other facts within the knowledge of the trustee, which he did not disclose, or that there was collusion between him and the plaintiff or defendant in such suit. *Andrews v. Herring*, 5 *Mass. Rep.* 210.—*Am. Ed.*

Chap. II. s. 1. it would be unjust to suffer that to be given in evidence against a man, from which he could not have derived any benefit; but this general rule is liable to exception, in cases where a man is privy in estate with the person who recovers the verdict, for in such case the verdict will be evidence for him, though he would not have been bound by it, had it been the other way.

Vide Pike v. Crouch, 1 Lord Raym. 730, and Rushworth v. Countess of Pembroke, Hard. 472.

Thus, if there are several remainders in the same deed, and he who is in possession recovers a verdict in an action brought against him for the land, another remainder man may give this verdict in evidence in another action against him, at the suit of the same plaintiff; for had the verdict been against the termor, the remainder man would have been dispossessed. So had there been a verdict for the tenant for life, in ejectment, where no aid can be prayed, it seems that the reversioner might, nevertheless, give this verdict in evidence, because he would have been prejudiced by such verdict, for his reversion would have been turned thereby into a naked right. Of this, however, Lord Chief Baron GILBERT (page 35) makes a *quære*, and the point seems never to have been decided.*

Gilb. Law Ev. 35.

But when it is said that a verdict is not evidence for or against one who is not a party to a cause, it is not to be understood that a man who merely uses the name of another for his own benefit, is not bound by the verdict which is given against him. Courts of Justice in these cases, will take notice who is the real plaintiff or defendant in a cause; (z) and therefore, if a man bring an ejectment in the name of another, as his lessee, he being in fact

* In Com. Dig. Evid. (A.) 5, it is said, "A verdict for or against the plaintiff, with proof of the evidence by him given, shall be evidence in an action, *by another*, against him for the same thing; as in an action by a common carrier for goods delivered by mistake, a verdict for or against the plaintiff, with the proof by him given, shall be evidence in an action by the owner against the carrier for the same goods." Per Holt, at Guildhall, 14 W. 3. Mr. J. BULLER, (N. P. p. 243), mentions the same case, but it seems there that the verdict was not given in evidence, *as the verdict of a jury determining any point*, but as evidence of a confession on record by the carrier, that he had the goods of the person who afterwards so brought the action, and to lay a ground for proving what a deceased witness swore; though it should seem that the last part of the evidence would be objectionable, if, as we have heretofore seen and shall have occasion to state hereafter, the objection to a proceeding *inter alios* applies to depositions as well as to records. The case of *Whately v. Menhain*, 2 Esp. N. P. Cas. 608, seems also to have been decided without attending to this rule, that no one can use a verdict as evidence for him who could not have been bound by it, had it been the other way, for the plaintiff in that case would clearly not have been in the least affected by the verdict had the issue been found for the defendant, unless he had been one of the creditors on whose petition the issue was granted, which appears not to have been the case.

(z) Vide ante.—AM. Ed.

the real plaintiff in the cause, the verdict is evidence for or against him, in an ejectment brought in the name of another plaintiff, on his demise; and in like manner a recovery, in an action of trespass, against one who, justified as servant of *A.* is admissible, though not conclusive evidence of the right in an action against another servant of *A.* for a similar trespass. (a)

There is another exception to the rule, that a judgment is only evidence between the parties, or those claiming under them, and that is, wherever the matter in dispute is a question of public right; (b) in this case all persons standing in the same situation as the parties, are affected by it, and it is evidence to support or defeat the right claimed; thus, a verdict finding a customary mode of tithing, (1) the right of a city to toll, (2) the right of election of a churchwarden, (3) or schoolmaster, (4) a customary right of common, the liability of a parish to repair a particular road, (5) a public right of way, (6) or the like, is evidence for or against the custom or right, though neither of the litigating parties are named in, or claim under those who are parties to the record.

The effect of verdicts in *criminal cases* on the civil rights of the parties does not appear; till lately, to have been very clearly settled. Hardly any thing is to be found in the more early books on the subject but loose *dicta*, from which very little information can be collected. It is said in one book, of very little authority, that "the verdict in a *civil cause* may be given in evidence in a *criminal cause*, but not *vice versa*, and that the Court said they would hardly grant a new trial where a verdict might become evidence in a *criminal cause*." (7) From this note, loose as it is, it may be collected that the question did not arise in the case then before the Court; but that they were only apprehensive that the verdict in that cause might be made the foundation of a criminal proceeding. This, I presume, is all that is meant by its being evidence; for it could never be thought for a moment that it would be so of the criminal fact; and it is plain the Court did not proceed on the ground of a former verdict in a *criminal case* having been offered in evidence in a *civil suit*.

Lord Chief Baron GILBERT, indeed, makes a *quære*, whether

(a) The authority of this case is doubted. Vide *Outram v. Morewood*, 3 *East's Rep.* 346, and the remarks of *SEYMOUR J.* on it in *Case v. Reeve*, 14 *Johns. Rep.* 82.—*AM. ED.*

(b) Verdicts and judgments between other parties, are admissible to prove a public right of way, only where the party claims by prescription; and merely to corroborate the presumption of a grant. *Fowler v. Savage*, 3 *Com. Rep.* 90.—*AM. ED.*

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Kinnerley v.
Orpe, Dougl.
517.

(1) *Gillb. Law*
Ev. 36.

(2) *City of*
London v.
Clarke,
Carth. 181.

(3) *Berry v.*
Banner,
Peake's N. P.
156.

(4) *Lord*
Broncker v.
Sir Rd. Atkyn,
Skin. 15.

(5) *Rex v. St.*
Pancras,
Peake's Cas.
219.

(6) *Reed v.*
Jackman,
1 East, 355.

(7) *Richard-*
son v. Wil-
liams,
12 Mod. 319.

Gillb. Law
Ev. 32.

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such verdict can be given in evidence, because the party could not attain the jury as he could in a civil action; but there are many cases where verdicts may be given in evidence against a party who could not have an attain; such are all those which establish customs and other public rights, where, as was just now observed, the verdict is always received in evidence against persons who, being neither parties nor privies to the cause, could not avoid it by that remedy; that therefore, does not seem to be the true criterion by which the question is to be decided.

Gibson v.
M'Carty, Cas.
temp. Hardw.
311.

One other case occurs, which also contains little more than a *dictum*, though certainly one of great authority on the subject: It was an issue directed to try whether certain notes of hand were forged or genuine; and on the trial the plaintiff having read the deposition of a deceased witness to prove the handwriting, the defendant offered the record of a conviction of the plaintiff for forging *another* similar note to which the same witness had also sworn. This evidence was objected to by Sergeant *Parker*, who contended that, "it was a rule of evidence that no record of a criminal action could be given in evidence in a civil suit, *because such conviction might have been upon the evidence of a party interested in the civil action.*" Lord *HARDWICKE* is reported to have said, that the general rule was as Mr. Sergeant *Parker* had mentioned, and that it had been so strictly kept, that, in a case which he mentioned, and which I shall presently state, the Court, on a question of legitimacy, refused to admit in evidence a sentence of excommunication in the Spiritual Court, for fornication between the father and mother of the party whose legitimacy was impeached; and therefore he rejected this conviction.

This case of *Gibson v. M'Carty* is not very accurately reported, but it is clear that the evidence which was offered was properly rejected; for the conviction was on another transaction, which ought not to have prejudiced the claim before the Court. In the case cited, too, the judgment of the Ecclesiastical Court was not directly upon the point: the father and mother of the party might have committed fornication, and yet have been married previous to his birth; and it is clearly settled, that a judgment is not evidence of any fact which is only to be collected by inference from it. That this was one ground at least of the determination, appears from a more full statement of the same case by the name of *Hillyard v. Grantham*; though it must be confessed that, by the manner in which it is there cited by Lord *HARDWICKE*, that learned magistrate seems to have adopted the general principle, that a verdict in a criminal case cannot be evi-

Vide post.

Hillyard v.
Grantham,
2 Ves. 249.

dence in a civil suit. His Lordship stated the case to be a trial at bar on an issue directed out of the Court of Chancery, and said that he was counsel in the cause. That, during the life of the father and mother, there had been a proceeding against both of them, in the Consistory Court of *Lincoln*, for living together in fornication, and sentence given against them: on the trial, that sentence was offered in evidence to prove that they were not married; and the whole Court were of opinion that it could not be given in evidence; because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, that it was *res inter alios acta*, and could not affect the issue.*

But they held, that if it had been a sentence on the point of the marriage, on a question of the lawfulness of the marriage, it being the sentence of a Court having proper jurisdiction, might have been given in evidence.

There is also another *Nisi Prius* decision of Lord HOLT, which should be noticed in this place. A man being prosecuted for a fraud in obtaining a note of hand, the person who had been defrauded was called as a witness, and that learned Judge rejected his testimony; assigning, as a reason, that *though the verdict could not be given in evidence in an action on the note, he was sure to hear of it to influence the jury.* This dictum of Lord HOLT is open to two constructions; his Lordship might either mean to say, that in no case could a judgment in such a prosecution be given in evidence in a civil action; or only, that a verdict *founded on such evidence as was then offered*, would not be admissible; and with this latter construction agrees Lord Chief Baron GILBERT, who says, that where the conviction is in fact founded solely on the evidence of the party interested in the civil suit, the record cannot be evidence in it, because a party shall not be permitted to give that evidence by indirect means which he would not be heard to speak as a witness; and though the case cited by GILBERT is silent as to this point, and only proves that the description of a party in an indictment, or the evidence then given by a witness, since deceased, is not evidence on an appeal, yet from what was said by Serjeant *Parker* in the case of *Gibson v. McCarty*, it is plain that some opinion was entertained in *Westminster Hall* at the time GILBERT wrote as to this distinction. If we suppose that, in that case, the party inter-

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Rex v. Whit-
ing, Salk. 283.

Gilb. Law. Ev.
30, cites 1 Sid
325.

* As to this point, see the several cases in s. 2, *et seq.* which clearly show, that where a marriage comes directly in issue in the Ecclesiastical Court, it is evidence against the issue; and what is subsequently said by Lord H. himself, in this very case, shows that this would have been no objection.

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ested had been in fact examined as a witness on the prosecution, it explains the whole ; and shews, that on this ground also the evidence might have been rejected, without establishing as a general proposition, that in no case could such a conviction be evidence. That a verdict cannot be used by the party on whose testimony it was obtained, as evidence for him of the fact found by it, is now clearly settled by several modern cases. In one (1) the party attempted to avail himself of the conviction by a supplemental bill, but failed of success ; and in another, (2) the Court held the party injured to be a competent witness on the indictment, on the express ground, that the conviction would be no evidence in support of his civil rights.

(1) *Bartlet v. Pickersgil*,
post.

(2) *Rex v. Boston*,
4 East, 373.

Gibb. Law
Ev. 31.

But it is said also by GILBERT, that if the party was not examined as a witness on the prosecution, or his evidence formed a part only of that given to the jury, the verdict in the criminal prosecution may be evidence in the civil cause ; with deference to so great an authority, I cannot help observing, that it seems rather contrary to the general principle of rejecting all evidence of an interested party to permit a verdict, where his testimony formed any part of the consideration of the jury, to be given in evidence ; for it seems difficult to draw the line, and say how far they might be influenced by his testimony, or by that of any other witness. It is further to be observed, that no such distinction was made in the case of *Bartlet v. Pickersgil*, the conviction in which case was founded on other evidence besides that of the plaintiff ; and in several recent instances (3) it has been decided, that in no case where the party is examined, can the conviction be received as evidence for him of the fact found by it.

(3) *Smith v. Rummins*,
1 Campb. 11.
Hatherway v. Brown, ib. 151.
Burden v. Browning,
1 Taunt. 520.

Having thus mentioned the several cases which seem to shew, that the evidence we are speaking of is in no case admissible, opposed as they are by the *dictum* of GILBERT, I shall, in addition to his authority, refer to the cases which daily occur of convictions on proceedings *in rem* in the Exchequer, and to what

(4) *Bul. N. P.*
245.

is said by Mr. Justice BULLER, (4) who lays it down as a general rule without any limitation, that, "a conviction in a Court of criminal jurisdiction is *conclusive* evidence of the fact, if it afterwards come collaterally in controversy in a Court of civil jurisdiction ; as suppose, says he, the father convicted on an indictment for having two wives, this would be conclusive evidence in an ejectment where the validity of the second marriage was in dispute : but he adds, the conviction would not be *conclusive*, so as to bar the party in a writ of dower or appeal, where the legality of the marriage came in question," though it

would be *prima facie* evidence on a plea of *ne unques accouple* before the Bishop. The reason why the verdict would be conclusive in the ejectment, and not so before the Bishop, I conceive to be, because in the one case the question of marriage would arise only collaterally and incidentally; but, in the other, it would come directly in question before a Court to whose peculiar jurisdiction the trial of it belonged, and who could not be ousted of that jurisdiction by the finding in any other Court. It must, however, be observed here, that no authority is cited by Mr. J. BULLER, which proves that such a verdict would be conclusive evidence in the action of ejectment. The authority referred to (3 *Mod.* 164.) only shews that the Court prohibited a suit in the Spiritual Court, *causa jactitationis maritagii*,* brought by a man, who was convicted of bigamy, against his second wife, who pleaded the conviction, and applied for a prohibition; all that was said about the effect of such a conviction, on the plea of *ne unques accouple*, was in the argument of *Levinz* as counsel, but nothing appears to have been said, either at the bar or by the bench, as to its effect in an ejectment.

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But it is agreed, that had the party been acquitted, this would have been no evidence at all, in support of the second marriage, for it proves no fact; the defendant might have been acquitted, because he had reason to believe his first wife was dead, or for many other reasons, without supposing the second a legal marriage. In like manner, when there has been a judgment for the Crown on an information *in rem* in the Exchequer, it has been held to be *conclusive* evidence to vest the property in the Crown, and not to be controverted in any civil action; but a judgment of acquittal does not seem to have so strong an operation in favour of the party.†

* This case is very obscurely stated in the report. When I first read it, I conceived that the verdict was offered to *disprove* the second marriage, by showing the illegality of it; and therefore concluded that the reporter was mistaken in stating it to be a cause of jactitation; and that in fact it must have been a suit for restitution of marital rights, or some other cause wherein the person suing claimed to be the husband; but, on further investigation, the verdict seems to have been introduced as evidence of a marriage *de facto* having taken place with the second wife.‡

† *Scott v. Shearman*, 2 *Black.* 977. In an action of trespass for breaking the plaintiff's house and seizing his goods, which consisted of a quantity of Geneva, the defendants, who were custom house officers, proved a copy of a record of condemnation in the Exchequer of the same Geneva, and the Court, after solemn argument, held this to be *conclusive* evidence in favour of the defendants, and not to be controverted. But a condemnation before the Commissioners of Excise, does not, it

‡ Vide the best report of this case in *Comberb. Rep.* 72.—AN. ED.

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I shall conclude this part of the subject, by mentioning one more rule applicable to *verdicts*; and that is, that until final judgment is entered upon them,⁽¹⁾ they are no evidence of the fact having been legally decided, for if the *postea* only be produced,

(1) *Pitton v. Walter*,
1 Stra. 161.

has been said, conclude the party from disputing the property of it in an action for the seizure. *Henshaw v. Pleasance*, 2 Black. 1174; and vide *Terry v. Huntington*, cited 1 *Ld. Raym.* 471; *Fullon v. Fitch*, *Carth.* 346; *Cas Temp. Holt*, 287; *Roberts v. Fortune*, 1 *Hargr. Law Tracts*, 468; and the general principles stated, *post.* In *Hart v. M'Namara*, C. P. Sittings after Easter Term, 1817, (cited 4 *Pri. Ex. Rep.* 154,) *Ld. Ch. J. GIBBS* held, that a condemnation of *rem.* as being adulterated, was evidence against the plaintiff, though such condemnation took place while the ruin was in the hands of the defendant.

Cooke v. Sholl, 5 *T. Rep.* 255. Trover for several pipes of wine. The plaintiff being a wine merchant, had purchased these pipes of *Hicks*, which the defendant seized for want of a permit; and it appearing to be a malicious seizure, the jury gave a verdict for the plaintiff, with 150*l.* damages. The defendant had prosecuted this seizure in the Court of Exchequer, and the record of acquittal was read in evidence. The defendant insisted under the circumstances (which it is unnecessary here to state) that the permit was out of time; and the Judge was of that opinion; but, it being suggested, that a different determination had been made in the Court of Exchequer, he saved the point, with liberty to enter a verdict for the defendant if it should be adjudged with him.

The counsel was proceeding to argue the cause on the merits, when the Court suggested a doubt upon another ground, and Lord KENYON said, that he conceived the judgment of acquittal *in rem* was conclusive as to the question of the illegality of the seizure, and precluded all reasoning upon the construction of the permit; and however he might doubt whether the Court had put a true construction upon the effect of the instrument, yet he could not help thinking that the judgment of acquittal was conclusive as to the illegality of the seizure: which was the subject of the present action. That it seemed to be taken for granted, in Lord MANSFIELD's time that a judgment of condemnation *in rem* was conclusive between the parties.

On this the rule was discharged: but, on a subsequent day, *Leycester* moved to open the rule again, stating that the ground on which they had before decided, was not clearly settled, and therefore he wished to have an opportunity of arguing it, for that there was a distinction as to the effect of a judgment of acquittal or condemnation *in rem* in the Exchequer; the former was not conclusive, though the latter was. *Bull. N. P.* 245. But independently of that question, he observed, that the case had been saved on a different point which was stated in the report, namely, the construction of the permit. Upon this the matter was ordered to stand over, and when it came on again, *Bower*, for the plaintiff, confined his observations to the effect of the judgment of acquittal in the Exchequer, and pressed the other side to consent to have the whole matter stated on the record: but this being objected to, the Court, though they expressed a wish that the parties would consent to have the question respecting the judgment of acquittal put upon the record, as it was a point of great importance, said, that at present they could not go out of the report, which confined the question to the only point made at the trial concerning the construction of the permit, on which no doubt could be entertained, but that the time was out when the seizure was made, and so there must be a verdict for the defendant. Rule absolute.

In the following case, however, a sentence of acquittal was considered as conclusive. In an action of assault and battery, the defendant justified as an officer in the army for disobeying orders, and gave in evidence a sentence of a council of war upon a petition against him by the plaintiff, and the petition being dismissed by the sen-

it does not appear that the judgment might not have been arrested, or a new trial granted, (c) but the *postea* is good evidence to shew that a trial was had between the same parties, so as to introduce an account of what a witness who is since dead, swore at that trial, for which purpose even a nonsuit is evidence. A verdict on an issue out of Chancery, however, is full proof of the fact it finds, though no judgment is entered upon it, for the decree is equal proof that the verdict was satisfactory, and stands in force. (d)

Chap. II. s. 1.
Verdicts.

Montgomery
v. Clark, B.
N. P. 234.

Writs issuing out of the Courts at *Westminster*, are not considered as records till returned and filed in the Court; when- ever, therefore, a writ is the gist of the action, it must be filed, and a copy of it taken from the record; inasmuch as the party is to have the utmost evidence the thing is capable of, for it cannot become the gist of an action till it is returned; (e) but when

Proof of
Writs.

Gillb. Law Ev.
40. Bnl. N. P.
234.

tenue, it was holden to be conclusive evidence for the defendant. *Lane v. Degberg*, H. 11 W. 3. Bnl. N. P. 224. See also *Vin. Evid. (A. B.)* 22, where Baron PARKE is said to have admitted an *acquittal* in the Exchequer as conclusive.

For the several instances in which the judgment of a Court, whether of Record or otherwise, shall be admitted as evidence, and to what extent, see post.

(c) The rule of the text was recognised in the case of *Ridgely et al. v. Spencer*, 2 Binn. Rep. 70.

In *New York*, a verdict in an action before a justice of the peace, is evidence, without producing the judgment; for the justice is bound to give judgment on the verdict, and can neither arrest it nor grant a new trial. *Felter v. Mulliner*, 2 Johns. Rep. 181.

In *Pennsylvania*, a verdict in a former ejectment, is evidence against the defendant, although no judgment has been entered, if he has acquiesced in it, by paying the costs and delivering the possession. *Shaeffer v. Kreitzer*, 6 Binn. Rep. 430.—AM. ED.

(d) No one can take the benefit of a verdict or deposition, who would not have been prejudiced by it, had it been contrary. *Boudreau v. Montgomery*, C. C. Nov. 1821, M. S. Rep.

In debt on bond against A. the principal, and B. and C. sureties, an award under a reference between A. and the obligee, is not evidence to prove the amount due by A. *Simonton v. Boucher et al.* C. C. Jan. 1811, M. S. Rep.

Where a verdict is had against a Sheriff for the escape of a prisoner who had given security for the liberties of the jail, in an action by the Sheriff on the bond, the *postea*, without the judgment, is evidence to prove the recovery and actual damages, at least, if not the escape. *Kip v. Brigham*, 7 Johns. Rep. 163.

On a breach of covenant against incumbrances, the *postea* in an action of ejectment by a mortgagee is sufficient. *Waldo v. Long*, 7 Johns. Rep. 173.

In *Foster v. Compter*, 2 Stark. Rep. 364, it was held that in an action by one defendant in *assumpsit*, against his co-defendant, the *postea* was evidence to prove the amount of damages, but the endorsement of costs with the Master's *allocatur* on the *postea*, was not sufficient to entitle the plaintiff to recover half the costs, without producing the judgment.—AM. ED.

(e) It seems that the confession of the plaintiff, that the timber was taken by a bailiff under an attachment, is not sufficient evidence of the existence of the attach-

Chap. II. s. 1. the writ is only inducement to the action, the fact of its having
 Verdicts. issued, may be proved by the production of the writ itself, be-
 cause by possibility it might not be returned, in which case we
 have seen it is no record.

Returns of
 Writs.

(1) Rea v.
 Elkins,
 4 Burr. 2139.

(2) Best v.
 Moravia.

(3) Gyfford v.
 Woodgate,
 11 East, 297.

Cator v.
 Stokes, 1 M.
 & S. 599.

When a writ is duly returned and filed, the return is so far evidence of the facts stated in it, as not to be disputed incidentally; and therefore if the Sheriff return a rescue, (1) or a summons on a writ of *scire facias*, (2) the parties cannot dispute it on affidavits. And in a late case, (3) where an action was brought against a plaintiff in a former suit for maliciously suing out an *alias fieri facias* after a sufficient levy under the first; the Sheriff's return endorsed on the two writs, (which were produced by the plaintiff as part of his case,) wherein the Sheriff stated that he had forborne to sell under the first, and had sold under the second at the request of the now plaintiff, were held to be *prima facie* evidence of the fact so returned. But the return will not be even *prima facie* evidence of any fact not stated in it; and therefore a return to a *fieri facias*, stating that the Sheriff had levied the money, does not prove that he paid it over to the judgment creditor, so as to charge him in an action for money had and received. (f)

ment, but that the record itself ought to be produced. *Jenner v. Jolliffe*, 6 Johns. Rep. 9.

The confession of the defendant that he had been served with a *subpoena*, is not sufficient evidence of the fact, if the writ is capable of being produced. *Hasbrouck v. Baker*, 10 Do. 248.

The contents of a writ cannot be proved by *parol*, so long as the writ itself or a copy thereof, is capable of being produced. *Brush v. Taggart*, 7 Do. 19. Et vide *Foster v. Trull*, 12 Do. 456.

But in an action of debt against the Sheriff for the escape of a prisoner in execution on a *ca. sa.* *parol* evidence is admissible to shew the issuing of the *ca. sa.* its delivery to the Sheriff, and the arrest of the party thereon; the defendant having neglected to return and file the *ca. sa.* and having refused to produce it at the trial, after notice given. *Hinman v. Brees*, 13 Johns. Rep. 529.

No proceedings are a matter of record until enrolled. *Croswell v. Byrnes*, 9 Johns. Rep. 287.

An entry on the record of the award of a writ, does not conclude the party from denying the fact, and shall be tried *per pais*. *Brown v. Van Deuzen*, 10 Johns. Rep. 51. Et vide *Taylor v. Dundas*, 1 Wash. Rep. 94.

The entries on the docket, even if inconsistent with the judgment, are inadmissible for the purpose of impeaching it. *Southgate v. Burnham*, 1 Greenl. Rep. 369.—
 Am. Ed.

(f) *Parol* evidence is admissible to prove that a *fa. fa.* was levied, though no return was made upon it. *Bullitt's exr. v. Winston*, 1 Mansf. Rep. 969.

In *New Jersey*, a transcript of a justice's docket, is not evidence to prove the delivery of execution to a constable. *Hunt v. Boylan*, 1 Hals. Rep. 211.

A Sheriff's return is no evidence of money paid to the plaintiff. *First v. Miller*, 4 Bibb's Rep. 311.

SECTION II.

Of Public Writings, not being Records.

PUBLIC matters, not of record, are next to be considered. *Chap. II. s. 2.*
 —Some of these resembling records in being confined to one place for public satisfaction, the law suffers the like evidence to be given of them, as is usually given to a jury of records, viz. true copies examined with the original: and gives a degree of credit to others when produced, which it does not to a mere private instrument.

Of this nature are—

1st. JOURNALS OF THE HOUSES OF PARLIAMENT.

2dly. PROCEEDINGS IN THE COURT OF CHANCERY, by bill of complaint, which not being precedents of justice, but founded on the circumstances of each particular case, are not considered as furnishing a general rule of action; and for that reason are not denominated records.

A Sheriff's return is conclusive of the fact who was the purchaser at a sale made by him. *Small et al. v. Hodgen*, 1 *Littell's Rep.* 16. Unless falsified by a judicial sentence in a proceeding to which the Sheriff was a party. *Trigg v. Lewis's exrs.* 3 *Do.* 129.

If land was sold by the Sheriff, the best evidence would be the return by the Sheriff to the *venditioni exponas*.—Per TILGHMAN C. J. *Salmon et al. v. Rance et al.* 3 *Serg. & R. Rep.* 314

The docket entries are not evidence of the issuing, service, and return of a writ. The writ itself must be produced. *Vincent v. Huff's les.* 4 *Serg. & R. Rep.* 288. See contra *Taylor v. Dundass*, 1 *Wash. Rep.* 94.

In an action of debt on bond against the sureties of the Sheriff, where the plea was payment, with leave, &c. the return of "*levied as per inventory*," was not conclusive upon the defendants, but he might shew that the irregularity of the Sheriff's proceedings arose from the plaintiff's interference. *McKean v. Penrose's executor*, *Nisi Prius*, 1803, *M. S. Rep.*

In debt against a Sheriff for an escape on a ca. ca. to which he had returned "*cepi corpus et committitur*," parol evidence that he did not make the arrest till three days after the return, is not admissible. *Showell v. Fell*, 3 *Yeates' Rep.* 17. 8. C. 4 *Do.* 47.

In debt on a *replevis* bond, evidence is not admissible to contradict the Sheriff's return of *elongatur*. *Phillips v. Hyde*, 1 *Dall. Rep.* 439.

The return of a Marshal to a writ, cannot be traversed in an action between the parties to a suit, in which it issued. *Wilson v. Hurst's exrs.* 1 *Potter's Rep.* 441.

In an action against the Sheriff for a false return to an execution of *nulla bona*, the burden of proof lies on the plaintiff. *Davis v. Johnson & Co.* 3 *Munf. Rep.* 81.

Although in an action for a false return, the plaintiff may falsify it by evidence, yet the officer making the return cannot be admitted to contradict it. *Purrrington v. Loring*, 7 *Mass. Rep.* 323.—*AM. Ed.*

Chap. II. s. 2.
Journals of
Parliament.

3dly. Proceedings in the ECCLESIASTICAL or ADMIRALTY COURTS.

4thly. Those in FOREIGN COURTS.

5thly. INFERIOR JURISDICTIONS.

6thly. ACTS OF STATE AND GENERAL HISTORY.

7thly. COMMISSIONS executed on public occasions.

8thly. PARISH REGISTERS.

9thly. All other things which *applying to several persons*, are in some degree of a PUBLIC NATURE, as the rolls of Courts baron, terriers, and books of public companies and corporations.

Though I have, agreeable to the modern decisions, placed the *proceedings of the House of Commons* in this class, yet it seems formerly to have been matter of doubt, whether the Journals of that House were not entitled to the authority of records in the strict technical sense of that word. Sir EDWARD COKE, whose high opinion of the authority of Parliament is well known to every constitutional lawyer, has contended that they were so; and in support of his opinion has referred to the Statute 6 Hen. 8. c. 16, which prohibits the absence of any of the members, without licence *entered of record* in the book of the clerk. Notwithstanding this high authority, it has been said, that as the House itself is not a Court of record, none of its proceedings are so; and such is now the general opinion. According to the old notions of evidence, copies of nothing short of records could be received as evidence of the originals, and therefore it has by some been thought that in this case the books themselves should be produced; but the contrary is now clearly established, and copies from the books of either House examined with the originals, and proved by a witness, are equally received as evidence of the proceedings of the House; though in cases where either House of Parliament merely comes to resolutions as a foundation for other proceedings, these resolutions are no evidence of the truth of the fact resolved; and therefore on the trial of *Oates*, the resolution of the two Houses, (1) as to the existence of the popish plot, was properly held to be no evidence in a Court of Justice of the truth of that fact; and in two much later cases, in one (2) of which the House of Commons had resolved that a publication was a libel on the House, and in the other (3) that it was a libel on the Constitution, and where the *Attorney General* was ordered to prosecute, the jury were nevertheless directed to consider the intention of the defendants, and in both cases acquitted the party who was so prosecuted. (g)

4 Inst. 23.

Vide Cowp.
17.

Jones v.
Randall,
Cowp. 17.
Rex v. Ld. G.
Gordon, Doug.
590.

(1) 4 St. Tr.
39.

(2) Rex v.
Stockdale, K.
B. Westminster.
after Mich.
30 G. 3.

(3) Rex v.
Reeves, K. B.
Guildhall,
after East T.
36 G. 3.

(g) The printed journals of Congress have been allowed to be read without proof

The BILL IN CHANCERY, when further proceedings had been taken on it, was formerly considered as evidence against the plaintiff, of any fact stated in it; but in modern times, (1) Courts, properly considering that most of the facts are the mere suggestion of counsel to extort an answer from the defendant, have held that it is no evidence for any other purpose, than merely to shew, that such a bill was in fact filed, or to prove such facts as are the subject of reputation and hearsay evidence, as the plaintiff's pedigree and the like; (2) and even of this some doubts have been made. (3)

That the ANSWER of a defendant is evidence against the person swearing it, or those claiming under him, (4) there can be no doubt, for if the admission of a man is received as proof of a fact against him, much more ought that confession which he makes on oath: but still it is considered as a confession only, though under a higher sanction, and therefore is admitted in no case where a confession would not be evidence; for which reason, (5) the answer of an infant by his guardian, (6) who is sworn to it, is not received in evidence against the rights of the infant; (h) and doubts have been entertained how far a *feme covert* should be prejudiced by her answer.*

The consequence which follows from the answer being considered as an admission only, is, that the objection that it was *res inter alios acta*, does not apply as in the case of other legal pro-

of their authenticity. *Commonwealth v. Longchamps*, Oyer and Term. Philad. 1784, *M. S. Rep.*

The notes of the Assembly, and minutes of Council, were admitted to prove the time of the notification of the repeal of an Act of Assembly by the King and Council. *Les. of Albertain v. Robeson*, 1 *Dall. Rep.* 9. Et vide *Bingham v. Cabbot et al.* 3 *Dall. Rep.* 19.

A printed copy of public documents, transmitted to Congress by the President of the U. States, and printed by the printer to Congress, is evidence. *Radcliff v. Un. Ins. Co.* 7 *Johns. Rep.* 38.—*AM. Ed.*

(h) Et vide *Mills v. Dennis et al.*, 3 *Johns. Ch. Rep.* 367. *Fraser v. Mursh*, 2 *Starkie's Rep.* 41.

Vide contra in an action for an assault. *James v. Hatfield*, 1 *Strange's Rep.* 548. Et vide *Salter v. Speir*, *Tayl. Rep.* 318.—*AM. Ed.*

* *Wrottesley v. Bendish*, 3 *P. Will.* 235. In this case, where the question was, whether the wife should answer jointly with her husband or not, the Lord Chancellor said, "I do not now give any opinion whether the answer may be read against the wife, when discover, or not, but as in all times heretofore, the wife as well as the husband, has been compelled to answer, I will not take upon myself to overthrow what has been the constant practice;" but his Lordship said he would not compel her to answer any thing which might subject her to a forfeiture, though the husband submitted to answer.†

† Et vide *Barron v. Grillard*, 3 *Ves. & Beam. Rep.* 166.—*AM. Ed.*

Chap. II. s. 2.
Bill in Chan-
cery.

(1) *Snow v. Phillips*, 1 *Sid.* 220. *Bul. N.P.* 235.

(2) *Doe dem. Bowerman v. Sybourn*, 7 *T. Rep.* 2
Taylor v. Cole, cited 7 *T. R.* 3.
note (a)

(3) *Ante.*

(4) *Lady Dartmouth v. Roberts*, 16 *East.* 334.

(5) *Godb.* 326.

(6) *Eccleston v. Petty*, alias *Speke*, *Carth.* 79.

Chap. II. s. 2.
Answers in
Chancery.

ceedings. Therefore in the case just mentioned, of the answer of an infant by his guardian, the admission of the latter so made, though not evidence against the infant, may be evidence against himself ;(1) and in an action against *B.* the answer of *A.* his partner, to a bill filed against him by *other creditors*, was admitted as evidence of the facts stated in it ;(2) as was also the voluntary affidavit of one man, who was jointly interested with another in an action brought against them both.(3) (i)

(1) *Beasley v. Magrath*, 2 Schosis & Lefroy, 39.
(2) *Grant v. Jackson and another*, Peake's N. P. 203.

(3) *Vicary's case*, Excheq. Gilb. Law. Ev. 57. *Brochman's case*, Gilb. Law Ev. 51. 1710, per Gould.

(4) *Earl of Bath v. Batterssea*, 5 Mod. 10.

(5) *Rex v. Carr*, 1 Sid. 418.

(6) *Boc dem. Pellatt v. Ferrars*, 2 Bos. & Pull. 542.

We have before seen that a copy of the whole judgment, and not a partial extract of it, must be produced to the jury ; the reason on which the rule was established, applies with equal force to proceedings in a Court of Equity, and indeed every other written instrument. The defendant is entitled, in a Court of Law, to have the whole of his answer read,(4) and so far was this rule carried in one case,(5) that where one answer had been put in by the defendant, and on exceptions taken to it, he put in a second answer, he was allowed on an information for perjury, to read the second answer in explanation of the general terms of the first. When, therefore, an answer is given in evidence, the party producing it makes the whole of it evidence for the defendant, of the facts positively stated in it : though not of those which are stated merely on hearsay, with the addition of the deponent's belief of their truth.(6)(k)* Still, though evi-

(i) A confession contained in an answer to a bill in Equity, filed by a third person, is evidence against the defendant in a suit at Common Law. *Kiddie v. Debrutz*, 1 Hay. Rep. 421. *Grant v. Jackson et al.* Peake's Cas. 203.

Where an answer is put in issue, what is confessed, need not be proved. *Hart v. Ten Eyck et al.* 2 Johns. Ch. Rep. 62.

But the plaintiff cannot avail himself of the answer of a defendant who is substantially a plaintiff. Vide *Field et al. v. Holland et al.* 6 Cranch's Rep. 8.

The answer of one defendant in Chancery, is no evidence against his co-defendant. *Phenix v. Ass. of Ingraham*, 5 Johns. Rep. 412. *Leeds v. Mar. Ins. Co. of Alexandria*, 2 Wheat. Rep. 380. *Clark's exrs. v. Van Rensdyk*, 9 Cranch's Rep. 153.

But it is against other defendants claiming through him. *Field et al. v. Holland et al.* 6 Cranch's Rep. 8. Vide *Van Reinesdick v. Kane et al.* 1 Gall. Rep. 690. *Bartlett v. Marshall*, 2 Bibb's Rep. 470.

Subsequent declarations by a party to a sale, which go to take away a vested right, are not evidence. *Phenix v. Ass. of Ingraham*, 5 Johns. Rep. 412.—AM. Ed.

(k) Sed quere vide *Hoffman et al. v. Smith*, 1 Caines's Rep. 157.

The confession of a party, must be taken altogether. *Newman v. Bradley*, 1 Dull. Rep. 240. *Farral v. M. Olen*, *ibid.* 392.

Where an answer in Chancery is given in evidence in a Court of Law, the party is entitled to have the whole of his answer read, and it is to be received as *prima facie* evidence of the facts stated in it, open however to be rebutted by the opposite party. *Laurence v. Ocean Ins. Co.* 11 Johns. Rep. 260.—AM. Ed.

* In Courts of Equity a different rule prevails ; the plaintiff may there select a

dence of the facts so positively stated, it is not conclusively so, but the plaintiff may contradict it by other evidence; or if the jury, from the whole circumstances of the case, see reason to believe one part of it, and to disbelieve another; they may use the

Chap. II. s. 2.
Answers in
Chancery.

particular admission, and when that is read, the defendant is obliged to prove the other facts stated in his answer by other evidence. Thus, where to a bill by creditors against an executor for an account, the executor answered that 1,100*l.* was deposited by the testator in his hands, and that afterwards on making up his accounts with the testator, he gave a bond for 1,000*l.* and the other 100*l.* was given him for his trouble and pains in the testator's business: though there was no other evidence that the 1,100*l.* was deposited but the executor's own oath, it was held, that when an answer was put in issue, what was confessed and admitted in it need not be proved by the plaintiff, but that it behoved the defendant to make out by proofs what was insisted on by way of avoidance. But this was held under this distinction: when the defendant admitted a fact, and insisted on a *distinct fact*, by way of avoidance, *then he ought to prove the matter in his defence*; because it may be probable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth, whatsoever he says in avoidance: but if it had been *one fact*, as if the defendant had said the testator had given him 100*l.* it ought to be allowed, unless disproved; because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can do it. And it being urged, that here the probability was on the defendant's side, because the testator did not take a bond for this sum as for the residue, the Chancellor said there was some presumption in that, but not enough to carry so large a sum without better attestation. *Amoy. Bil. Vac. 1707, per Cowper, Chanc. Gilb. Law Ev. 52.* I have been particular in extracting the whole of this case, because perhaps no other better shews the distinction between the rules of evidence in the Common Law Courts, and those possessing an equitable jurisdiction. In a Court of Law, it would have been said, as was urged in this case, that "if a man was so honest as to charge himself when he might roundly have denied it, and no testimony could have appeared, he ought to obtain credit when he swears in his own discharge." My habits of thinking and legal notions having been formed in Courts of Law, may perhaps have given me an unfair prejudice in favour of their rules; but I do confess that to me they appear, in this particular at least, most consonant to reason and justice.

The above note has given rise to some observations from Mr. Evans, in his notes on *Pothier* (vol. 2, pp. 157, 8.) He says, "the distinction is not between Courts of Law and Equity, but between *pleading* and *evidence*; and that if an answer in Chancery was introduced incidentally, and merely by way of evidence in a Court of Equity, it ought to be treated precisely in the same way as in a Court of Law. On the other hand, it is very clear, that if in a Court of Law a plea confesses the matter in demand, but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant." Were there any analogy between the proceedings of a Court of Law and those of a Court of Equity, there would be great weight in the answer given to the objection; but the two Courts proceed upon quite different principles, and each has adopted modes of procedure consistent with the principles upon which it acts. In a Court of Law the plaintiff states his case, and recovers upon the evidence which he himself is able to produce in support of it. The defendant is not called upon to make any confession by his plea; if he does so, it is his own voluntary act, and therefore ought to bind him. In the case which has given rise to these observations, we must suppose that the plaintiffs, the creditors, had no evidence whatever. Had they sued the executor at law, the plea of *plene administravit* would have been a complete answer to their actions, and no money could have been recovered from the

Chap. II. s. 2. same discretion in this instance, as in every other, of drawing such conclusion, as results from all the circumstances taken together.(1)

(1) Vide *Bermon v. Woodbridge*, Doug. 788.

(2) *Sparin v. Drax*, Mich. 27 C. 2. Bul.N.P. 238.

There is one instance, however, in which a part of an answer may be read without making the whole evidence, and that is where a person offered as a witness, has, in an answer, shewn himself interested in the event of the cause ;(2) the part of the answer, which is read for the purpose of rejecting his testimony, does not entitle him to have any other part read, and this for the best of all possible reasons, viz. that by doing so, the very purpose, for which it was produced, would be defeated, and he would be giving his testimony in the answer at the time that it appeared, that all evidence from him was inadmissible.

Affidavit.

(3) *Brochman's case*, Gilb. Law Ev. 52.

(4) *Smith v. Gorton*, 3 Mod. 36.

Similar to an answer is an affidavit of a man in the course of a cause ;(3) but a voluntary affidavit, or one not made in the course of a judicial proceeding, as, for instance, one made by the vendor of an estate before a *Master in Chancery*, to satisfy the purchaser that the estate was free from incumbrances,(4) cannot be proved without producing the original, and if meant to be relied on as a representation upon oath, must be proved also to be sworn ; for if only the hand writing be proved, it has no further effect than an admission in a note or letter; whereas the answer in Chancery always being on oath, it is in all civil cases taken to have been sworn by the defendant, without further proof of identity than copies of the proceedings in the cause;(5) and even on an indictment for perjury, proof of the hand-writing of the *Master*, before whom it purports to be sworn, and of that of the defendant himself, has been held sufficient evidence of the administration of the oath.(6)

(5) Gilb. Law Ev. 57. *Hennell v. Lyon*, 1 Barn. & Ald. 182.

(6) *Rex v. Morris*, 2 Burr. 1189.

defendant. To obtain justice, the creditors file a bill in Equity against the defendant, the very ground of their complaint being that they are remediless at Law, though in justice the defendant ought to pay the money. The Court of Equity does not require the plaintiff to prove his case ; the defendant has no means of compelling him to do so ; nor can he, as in a Court of Law, put in such a plea as he may think most advantageous to himself. On the contrary, his conscience is pressed into the service of the plaintiff ; the defendant is, in fact, *called as a witness for him*, and obliged, under the most solemn sanction, to state the case as it really is ; the legal result of the several circumstances is not sufficient, the circumstances themselves must be particularly stated, and on this statement alone (for we are all along speaking of a case where the plaintiff has no witnesses) is it that the plaintiff can recover one shilling of his demand. Where then exists the analogy between an answer in Chancery and a plea at Common Law, or how can this practice of a Court of Equity be called a rule of *pleading* ? It is merely a case of *evidence*, and if the plaintiff choose to avail himself of the defendant's testimony, and make him a witness against himself, whether the answer is used in one Court or in another, in justice and reason one would think it should have the same effect.

The next kind of proceedings which generally come from the Court of Chancery, are the depositions of witnesses; and as the depositions taken in other Courts stand on the same foundation, I shall here consider them together. These are not received on the same principle as the answer, namely, as an admission of the party, but as the next best evidence in the room of some other, which his adversary has been deprived of: and therefore it is, that in no case where a witness is living and to be found,* shall his deposition be read as evidence of the facts deposed to, or for any other purpose than to confront and contradict him,(1)(I) But when it is proved that the witness is dead, or that he cannot be found after the most diligent search, or, as has been said, has fallen sick by the way,(2)† the deposition of such witness shall be admitted in evidence; for though a private examination does not give that satisfaction to the mind, which a public one before

Chap. II. s. 2.
Depositions.

(1) Tilly's case, Salk. 286.

(2) Benson v. Olive, 2 Stra. 920. Godb. 286. Vide Luttrell v. Cory, 1 Mod. 283.

* In Tilly's case, the witness after examination became interested, and was a party in the cause, and TREYOR, C. J. at first thought that his deposition might be read: but TRACY and BLEWCOE being of a contrary opinion, TRACY went to the King's Bench to ask the opinion of that Court, and C. J. HOLT thinking that it was not evidence, TREYOR agreed. Vide etiam *Baker v. Lord Fairfax*, 1 Stra. 101. In *Kineman v. Crooke*, 2 Lord Raym. 1166, the witness had been examined in Chancery, and there referred to a written account. He afterwards became blind, and, on a trial at Law, his deposition was read, and he called to give parol evidence in support of it.†

(I) Parol evidence of what a witness swore on a former trial of the same case, (who was present but had forgotten what he swore,) is not admissible—it can only be done—1st. Where the witness is dead. 2d. Insane. 3d. Beyond seas. 4th. Where the Court is satisfied that the witness has been kept away by the contrivance of the opposite party. *Drayton v. Wells*, 1 Nott & Mc Cord's Rep. 409.

A deposition taken in a suit between *A.* and *B.* at the instance of the defendant, is not evidence against *B.* in another suit between *B.* and *C.* *Hovey v. Hovey*, 9 Mass. Rep. 216

But evidence of the testimony given by a witness on a former trial of the same cause, the witness in the mean time having been convicted of an infamous crime, is not to be received. *Le Baron v. Crombie et al.* 14 Mass. Rep. 234. Vide *Powell v. Waters*, 17 Johns. Rep. 176.

Evidence given in one suit by a deceased witness, is proper evidence in a subsequent one, where the point in issue is the same, and between the same parties, but also, for and against persons standing in the relation of *privies in blood, in estate, or in law*. *Jackson ex d. Bates v. Lawson*, 15 Johns. Rep. 539. Vide *Jackson ex d. Gillespy et al. v. Woolsey*, 11 Johns. Rep. 446. *Pegram v. Isabell*, 2 H. & Munf. Rep. 193.

On an appeal in a criminal case, what a witness, who is since dead, swore in the Court below, cannot be received in evidence against the defendant. *State v. Atkins*. *Overton's Rep.* 229.—AM. Ed.

† Though a good ground for postponing the trial, this would hardly now be considered as sufficient to make the deposition evidence.

† Vide *Hill v. Bulkley*, 1 Phillimore's Rep. 280.—AM. Ed.

Chap. II. s. 2. a Judge and jury does, it is nevertheless the representation of the witness under the sanction of an oath, and when he was

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equally liable to cross-examination by the party against whom his deposition is offered; for though certain questions are propounded to the witness in the form of interrogatories, yet it is the duty of the commissioners, before whom he is examined, to use all means to get at the truth; and they are not strictly tied down to the words of the interrogatories, but, as Lord Coke

(1) *Peacock's case*, 9 Co. 70, b.

says, (1) "to every thing else which necessarily ariseth thereupon for the manifestation of the whole truth of the matter in question." Even the evidence which a witness gave on a former trial between the same parties, (2) has after his death been read in a civil action, a foundation being laid for it by the production of the *postea*. But this is not allowed in a criminal prosecution. (3) And in other cases the witness who is to prove what was sworn, should give the precise words, and not what he supposes to be the effect of the evidence. (4)(m)

(2) *Coker v. Farewell*, 2 P. Wil. 563.

(3) *Sir John Fenwick's case*, 4 St. Tr. 265, &c.

(4) *Vide 4 T. Rep.* 290.

(m) An answer in a deposition that an *ex parte* certificate, which the witness had given is true, is not evidence. *Richardson v. Golder*, C. C. Penn. Oct. 1811, *M. S. Rep.*

An *ex parte* affidavit of an insolvent debtor, is inadmissible on a question of setting aside an execution on his goods. *Plankenhorn v. Cave*, 2 *Yeates' Rep.* 370.

Depositions taken in a foreign Court of Admiralty, may be read, to shew on what ground the sentence went. *Dederer v. Del. Ins. Co.* C. C. Penn. April, 1807, *M. S. Rep.*

The depositions contained in the proceedings of a foreign Court of Admiralty, condemning a vessel, are not evidence in an action upon a policy of insurance on the vessel. *Mur. Ins. Co. v. Hodgson*, 6 *Cranch's Rep.* 207.

A deposition taken *de bene esse*, before *narr.* filed, allowed under the circumstances of the case. *Mumford v. Church*, 1 *Johns. Cas.* 147.

Depositions taken before the trustees of an absconding debtor, may be used, the trustees being agents for both parties. *Cox v. Trustees of Paine*, 7 *Johns. Rep.* 298.

Depositions taken by consent, in a former cause in which the defendant was a party, and where the same title came in question, were ruled not to be evidence. *Les. of Weston v. Stammers*, 1 *Dall. Rep.* 2.

It is a settled rule of law, that what a witness has sworn on a former trial between the same parties, for the same cause of action, may be given in evidence in case of his death. *Miles v. O'Hara*, 4 *Binn. Rep.* 111. *Richardson v. Les. of Stewarts*, 2 *Serg. & R. Rep.* 84. *Lightner v. Wike*, 4 *Serg. & R. Rep.* 205. And so where the witness is out of the State. *Magill v. Kaufman*, 4 *Serg. & R. Rep.* 319. *Carpenter v. Groff*, 5 *Serg. & R. Rep.* 162.

It seems that a deposition or verdict in a former cause in relation to the same question between the same plaintiff, and a co-administrator of the same defendant, is evidence. *Boudreau v. Montgomery*, C. C. Penn. Nov. 1821, *M. S. Rep.*

Depositions taken in a suit with the *factor*, may be read in a suit with the *principal*, for the same cause of action. *Rischie & Co. v. Lyne*, 1 *Call. Rep.* 489.

But the notes taken by a counsel of the testimony of a deceased witness, supported only by his own oath that he believed the substance of what the witness said, are not evidence. *Lightner v. Wike*, 4 *Serg. & R. Rep.* 203.

It sometimes happens, that when witnesses are resident abroad, or about to leave the kingdom, or there is reason to fear their deaths, depositions are taken by the consent of the parties in a cause, or under the direction of a Court of Equity, on a bill filed for that purpose; and by Stat. 13 Geo. 3, c. 63, s. 40, it is enacted, that in all cases of indictments or informations laid or exhibited in the Court of King's Bench for misdemeanors or offences committed in *India*, that Court may, upon motion by the prosecutor or defendant, award a writ or writs of *mandamus*, requiring the Chief Justice and Justices of the Supreme Court at *Fort-William*, or the Judges of the Mayor's Court at *Madras*, *Bombay*, or *Bencoolen*, as the case may require, to hold a Court for the examination of witnesses and receiving other proofs. And after directing the mode in which the Court is to be holden, and the examinations taken, transmitted to *England*, and delivered into Court, the Statute goes on to enact, that such depo-

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Nor the notes of a Judge who presided at a former trial. *Miles v. O'Hara*, 2 Binn. Rep. 108. Et vide *Foster et al. v. Shaw et al.* 7 Serg. & R. Rep. 162.

A copy of a Judge's notes of the testimony of a witness since deceased, taken on a former trial, and certified by the Judge to be a true copy, is not evidence; nor are the original notes evidence without the oath of a Judge. *Jackson et al. v. Winchester*, 2 Yeates' Rep. 529. S. C. 4 Dull. Rep. 205.

The testimony of a witness (since dead) on a question of bail in the same case, is to be considered as a declaration *in pais* in the presence of the party; where he agrees to the statement, it may be received as his confession; where he is silent, the maxim *qui tacet consentire videtur*, is applicable; but where he denies it, the testimony is inadmissible. *Jackson et al. v. Winchester*, 2 Yeates' Rep. 529. S. C. 4 Dull. Rep. 205.

Depositions taken between the same parties on a *caveat*, before the Board of Property, are inadmissible, although the witnesses are dead. *Montgomery v. Snodgrass*, 2 Yeates' Rep. 230. *De Haas et al. v. Galbreath*, 2 Do. 315. *Sherman v. Dill*, 4 Do. 395.

A deposition sworn to between referees appointed by a rule of Court between the same parties, in a former suit, for the same lands, the witness having died, since the reference was ruled inadmissible. *Stares v. Chambers et al.* cited 2 Yeates' Rep. 232, n.

But a deposition read to arbitrators in a dispute between the same parties five years before, and afterwards confirmed on the personal examination before them of the witness, was admitted, the witness being dead. *White v. Dibling*, 1 Yeates' Rep. 400.

A deposition once read in evidence without opposition, cannot be afterwards objected to as being irregularly taken. *Evans v. Mettick*, 6 Wheat. Rep. 455. Vide *White v. Kibling*, 11 Johns. Rep. 128.

Where a prisoner had procured a witness to go away, evidence of what he had testified before a grand jury was admitted. *Rex v. Barber*, 1 Rost. p. 76.

It seems that if the testimony of what a witness swore at a former trial, be unaccompanied with the *postea* or record of the former suit, and at the time the objection be made, the evidence is inadmissible. *Boble v. Guernsey*, Johns. Rep. 451.

Vide post.—AM, Ed.

Chap. II. s. 2. sitions being duly taken and returned, shall be allowed and read; As to what shall be said to be a cause of action arising in India. and shall be deemed as good and competent evidence as if the witness had been present and sworn and examined *viva voce* at any trial for such crimes or misdemeanors: and that all parties concerned shall be entitled to take copies of such depositions at their own costs and charges.

The 44th section of the same Act makes a similar provision in civil actions or suits in any Court of Law or Equity in *England*, for which cause arises in *India*; (1) and though this clause does not, like the former, name the defendant, yet it has been held, that the writ may issue at his instance as well as that of the plaintiff; (2)

(1) Vide *Francisco v. Gilmore*, 1 Bos. & Pul. 177.

(2) *Grillard v. Hoger*, 1 Brod. & Bing. 519. But in cases where a party offers this secondary degree of evidence, he ought to adduce some kind of proof to shew that he is not capable of giving that which is ordinarily required; (3)

(3) Vide *Salk* 691. and therefore when the witness is usually resident in *England*, (4) or was here when the examination was taken, it must

(4) *Fonsick v. Agur*, 6 Esp. Ca. 92. be proved that he is out of the jurisdiction of the Court at the time his deposition is offered in evidence, for if he is within it, he himself must be called as a witness. (n)

(n) Where a deposition was taken by a commissioner in a foreign country, who certified that the witness was *duly sworn*, without shewing by whom or in what manner, it was held admissible. *Stocking v. Sage et al.* 1 Con. Rep. 519.

In the *U. States*, as well as State Courts in *Pennsylvania*, the depositions of witnesses are taken by virtue of rules of Court. In the Supreme Court, Rule 81st. District Court, City and County, Rule 47th. Common Pleas, Rule 22th, and in the Circuit Court, Rules 12th and 16th.

A rule to take depositions *de bene esse* of going witnesses, &c. may be granted before the return day of the writ. *Gilpin v. Semple*, 1 Dall. Rep. 351.

So where defendant was in confinement, upon affidavit, &c. *Stotesbury v. Covenhoven*, *ibid.* 164.

In *New York*, depositions of witnesses in certain cases may be taken, *de bene esse*, by a Judge's order, without the consent of the opposite party, but upon notice.

The examination may be taken after the commencement of the suit, and before issue joined. *Concklin v. Hart*, 1 Johns. Cas. 103. *Mumford v. Church*, *ibid.* 147.

The mode of examining the witnesses, and of returning their examinations, must follow strictly the Statute. Vide *Vandervoot v. Col. Ins. Co.* 3 Johns. Cas. 137. *Kirby v. Watkins*, 1 Caines' Rep. 503. *Watson v. Delafeld*, 2 Do. 260. *Beuchereau Le Guen*, 2 Johns. Rep. 196. *Hackley v. Patrick*, *ibid.* 478. *Blays v. Merrill*, 3 Do. 351. *Coles v. Thompson*, 1 Caines' Rep. 517.

For the usual practice in *Connecticut* of taking depositions, vide *Swift's Syst. Ev.* 112.

For the practice in the Courts of the *U. States*, see *Act of 24th Sept. 1789*, s. 30, *Ingersoll's Digest* 477.

But this does not apply to cases in the Supreme Court of the *U. States*, but only to those of the District and Circuit Court. Depositions in the Supreme Court can only be taken, upon a commission, according to its rules. *The Argv*, 2 Gall. Rep. 314, S. C. in Sup. Ct. *U. S.* 2 *Wheat. Rep.* 387.

In criminal cases depositions are taken by virtue of the Statutes 1 & 2 *Philip & Mary*, c. 13, and 2 & 3 *Philip & Mary*, c. 10. By the first of those Statutes it is enacted, "That justices of the peace, or one of them, when a prisoner is brought before them for manslaughter or felony, before any bailment or mainprize, shall take the examination of the prisoner, and information of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall put in writing, &c." The provisions of this Statute, relative to cases where the party is admitted to bail, are by the other Statute extended to those where he shall be committed to prison. On these Statutes it has been holden, that if in a case of felony one magistrate take the deposition on oath of any person in the presence of the prisoner, (1) (o) whether the party wounded, or even an accomplice: (2) and the deponent die before the trial, the depositions may be read in evidence, but if the prisoner be not present at the time of the examination, it cannot be read as a deposition taken on oath; though in cases where the party wounded declared himself apprehensive of death or was in such imminent danger of it as must necessarily raise that apprehension, it may be read as his dying declaration, (3) though not signed by the witness. (4) This Act of Parliament only extends to cases of felony, and therefore such examination cannot be read on an information for a libel. (5)

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(1) *Rex v. Railbourne, Leach Cr. Cas. 512.*

(2) *Rex v. Westbeer, ibid. 14.*

(3) *Rex v. Dingler, ibid. 638.*

(4) *Rex v. Hemming & Windham, 2 Leach. Cro. Cas. 996.*

(5) *Rex v. Paine, Salk. 281.*

Depositions taken according to the proviso in the 30th sec. of the Judiciary Act of 1789, c. 20, under a *dedimus potestatem*, according to the usage, when it may be necessary, are under no circumstances to be considered as taken *de bene esse*, whether the witness reside beyond the process of the Court or within it; the provisions of the Act relative to depositions *de bene esse*, being confined to those taken under the enacting part of the section. *Sergeant's les. v. Biddle et al.* 4 *Wheat. Rep.* 508. In reference to depositions taken *de bene esse*, and on commissions in the *U. States*, Courts, vide *Grant v. Naylor*, 4 *Cranch's Rep.* 224. *Beal v. Thompson et al.* 8 *Do.* 70. *The Argo*, 2 *Gallis. Rep.* 314, *S. C. in Sup. Ct. U. S.* 2 *Wheat. Rep.* 287. *Gilpins v. Consequa*, 1 *Peters' Rep.* 85. *Les. of Brown v. Galloway, ibid.* 291. *Willing et al. v. Consequa, ibid.* 301.

Where a commission was sent to a foreign country, and the government refused to let the commissioners act, as being an assumption of sovereign power, but it was executed by the Judge of a Court of the country, in the presence of the commissioners, the depositions of the witnesses were admitted; but the Court observed that they would see that the evidence was fairly taken. *Winthrop v. Un. Ins. Co. C. C. U. S. Penn.* 2 *Condy's Marshall*, 706, n.

The Circuit Court of the *U. States*, will issue letters rogatory, for the purpose of obtaining testimony, when the government of the place where the evidence is to be obtained will not permit a commission to be executed. *Nelson et al. v. U. States*, 1 *Peters' Rep.* 235.—AM. ED.

(e) Vide *Rex v. Smith*, 2 *Starkie's Rep.* 209. *ibid.* 1 *Holt's N. P. Rep.* 611.—AM. ED.

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- In like manner, depositions taken before a *Coroner*,⁽¹⁾ have, in cases of the death, or absence beyond sea, of the witnesses, and where there is reason to believe that the prisoner sent them away,⁽²⁾ been used on a trial for murder.* And where a pregnant woman died after examination, but before an order of filiation,⁽³⁾ such examination taken under the Stat. 6 G. 2 c. 31, was held to be admissible evidence on an application to the Quarter Sessions to make an order of filiation on the putative father; and uncontradicted, to be conclusive. And a still stronger effect is by the Stat. 33 Geo. 3 c. 9, given to an examination of a soldier under the mutiny Act, which may be read at any future time, whether he be living or dead, as evidence of his settlement.⁽⁴⁾ But in a case⁽⁵⁾ where two justices had taken the examination of a common pauper relative to his settlement, but did not remove him thereon, and he afterwards became insane, the Judges of the Court of King's Bench were equally divided on the question, whether two other justices could remove his family on that examination.
- Several other cases under similar circumstances, have since come before the Court; in one,⁽⁶⁾ the pauper having been examined and removed by two justices, after notice of appeal, and before the trial of it, absconded, and could not be found; nevertheless the Court held, that the respondents could not read his examination on the hearing of the appeal; and in two subsequent cases,⁽⁷⁾ the Court of King's Bench declared that the evidence offered in the case of the *King v. Eriswell* was not admissible, and rejected a similar examination even after the death of the pauper.

It was before observed, that a verdict could not in general be given in evidence against a man who was not a party to the cause, and consequently had no power to cross-examine the witnesses. This rule applies equally to the case of depositions which are, as to a stranger to the cause, mere *ex parte* examinations; and therefore, unless in those particular cases where the

Rushworth v.
Countess of
Pembroke,
Hard. 472.

* In the case of the *King v. Eriswell*, it was argued by Mr. J. BULLER, that the examination of the pauper was admissible; and in answer to the objection, that it was taken in the absence of the parties to be affected by it, he instanced the case of depositions taken before a *Coroner*, which were always evidence, though the party was not present. I do not find that this point has been expressly decided in any reported case; Mr. J. BULLER is reported to have said, that it was so settled in 1 Leo-180, and Kel. 55; certainly nothing of the kind appears in those books; nevertheless, the practice has been to admit them after the death of the witness, without inquiry whether the party was present or not; and, notwithstanding the objection of counsel, they were received by Mr. B. HOTHAM, in the *King v. Purefoy*, *Maidstone Sum. Ass. 1794*.

Legislature has made them evidence against all persons, or where they fall within the exception before noticed, in the case of judgments, as affording evidence of the *lex loci*,* they are not admitted to be read against him. (p) We have before seen that depositions as to facts in dispute are no evidence of pedigree more than in other cases ; (1) and therefore in such cases, as in others, a ground must be laid for their reception as proceedings in a cause, by connecting the person against whom they are offered in evidence, in interest with the party in the cause wherein they were taken, however remote the time of the examination. The other rule, namely, that a man who is not bound by proceedings shall not avail himself of them, applies with still greater force ; for if this were allowed, he might use all those deposi-

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(1) Ante, 17.
Banbury
Peerage Case,
2 Selw. Nis.
Pri. 684.

* In an action by the copyholder against the Lord of a manor, for a false return to a *mandamus*, in which a custom was set forth in respect of copyholds granted for two lives, that the surviving life might renew, paying to the Lord such fine as should be set by the homage to be equal to two years improved value, and not guilty pleaded, depositions made in an ancient suit, instituted against a former Lord of the manor, by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the Lord a reasonable fine to be set by the Lord or his steward, (and which depositions were made by witnesses on behalf of such copyholder) were held to be admissible evidence for the Lord, as depositions on behalf of a person standing *pari jure* with the plaintiff, although it was not proved that the persons making such depositions were copyholders, farther than as it appeared from the depositions themselves. The Court added in this case, that considering these depositions merely as declarations, they were still not objectionable on account of their being made *post litem motam*, because the same custom was not in dispute in the former suit as in the present. *Freeman v. Phillips*, 4 M. & S. 486. See vide ante, 24.

(p) An *ex parte* deposition before the Board of Property, may be read to the jury by the party against whom the decision of the Board is given in evidence, to shew the grounds on which they proceeded. *Gonzalus et al. v. Hoover et al.* 6 Serg. & R. Rep. 118.

Depositions taken officially by a public agent residing abroad, relative to the capture, are evidence in an action brought against him by the captors. *Bingham v. Cabbot*, 3 Doll. Rep. 39.

In *Howell's les. v. Tilden et al.* 1 Har. & M'Hen. Rep. 84, in an ejectment, the Court permitted the plaintiff to prove to the jury what a deceased person proved before commissioners appointed by Act of Assembly to perpetuate boundaries, &c. Et vide *Bladen's les. v. Cockey*, *ibid.* 230. *Jackson ex. d. Potter v. Bailey*, 2 Johns. Rep. 17.

What was admitted in a former suit between those whose interest is represented by the parties to the suit, will be admitted in evidence. *Fitch v. Hyde*, *Karb. Rep.* 238.

Depositions taken in a suit relative to the same subject matter, cannot be read in a subsequent cause between different parties. *Rowe v. Smith*, 1 Call. Rep. 487. Vide *Stevens v. Payne*, 2 Roofs Rep. 83.

The deposition of a witness who afterwards becomes interested, and is in full life at the time of the trial, is not admissible. *Erwin v. Reed et al.* 4 Yeates' Rep. 512.

Vide ante, p. 90.—AM. Ed.

Chap. II. s. 2. Depositions. tions which made for him, and those of a contrary description could not be used against him, because he had no power to cross-examine the witnesses.

I shall here mention only one case in which depositions are made evidence against all persons by particular Act of Parliament, and that is in the case of bankruptcy. By Stat. 5 Geo. 2 c. 30, it is enacted, "that commissions and depositions, or any part of such depositions, may, on petition to the *Lord Chancellor*, be entered on record; and in case of the death of the witnesses *proving the bankruptcy*, or in case the commission, depositions, proceedings, or other matters or things, shall be lost or mislaid, a true copy of such commission, &c. signed and attested as *therein after is mentioned*, shall and may, *upon all occasions* be given in evidence to prove such commission, and the bankruptcy of the person against whom such commission hath been or shall be awarded, or other matters or things.(g)

Janson v.
Wilson,
Dougl. 244.

If a commission issue, and a witness prove an act of bankruptcy on a *particular day*, and die, his deposition, when enrolled, may be given in evidence to prove the act of bankruptcy, *and the time it was committed*, against any person whatever; and therefore, if a creditor of the bankrupt levy his goods under an execution after the day on which such act of bankruptcy is proved, the deposition is sufficient to overturn it.

It is well observed by Mr. *Douglas*, in a note on the case of *Janson v. Wilson*, that there is a remarkable inaccuracy in this Act of Parliament. After prescribing the manner of entering the commission, &c. of record, it says, that true copies, signed as *therein after mentioned*, shall and may be given in evidence; but there is not, in the subsequent part of the clause, nor of the Act, any provision for attesting and signing the entries so made. It is only enacted that, "the *Lord Chancellor* shall appoint a person who shall, by himself or his deputy, by a writing under his hand, enter of record such commission," &c. On a liberal construction of the Act, it might possibly be implied that power was given to such officer to certify his enrolment, and then his certificate would, as we have seen in other instances, be sufficient evidence of the copy; but the safer way would certainly be to prove it examined with the original also.

It is a general rule, applicable to all proceedings in Courts of

(g) Certified copies of the proceedings filed in the District Court of the Commissioners, under the late bankrupt law of the *U. States*, were held *prima facie* evidence, against all persons of the commission, trading, and act of bankruptcy. *Rugan v. West*, 1 *Binn. Rep.* 263.—*AM. Ed.*

Equity, that in order to give in evidence an answer, depositions, affidavits, or any other interlocutory proceeding in a cause, a foundation must first be laid by proof of all the former stages of it; (1) as the bill to make way for the answer; (2) the bill and answer, or that the defendant was in contempt, as the foundation for the depositions, and so on; otherwise two inconveniences would follow; first, that the whole context and bearing of the evidence would not appear; secondly, that the Court could not see whether it was a regular proceeding; and if not, then the answer or depositions would have only the effect of a mere voluntary affidavit, which if made by a stranger, could not be received as any evidence at all, because there the party would have no opportunity of cross examination; and if by the party, then only under the circumstances and manner before stated; but where on a bill filed for the examination of witnesses, the Court of Equity made an order before answer or contempt, that a witness who was going abroad should be examined, and a copy of the interrogatories was handed over to the adverse party, and after examination another order was made for publication with the express view of his deposition being read on a trial at law, it was held that the deposition might be read though the party did not in fact cross examine the witness. As to the interrogatories, it may be taken as a general rule, that the question proposed by them should not be leading. If depositions are taken in answer to such interrogatories in the Court of Chancery, that Court will suppress them; and the like would be done on depositions taken in a Court of Law under a commission. But where ancient depositions were produced, which had been in other respects duly taken, and suffered to pass publication in the Court of Exchequer, the Court of King's Bench held them to be admissible in evidence, although the interrogatories were so leading as necessarily to dictate the answer to be given. (r)

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(1) *Roch v.**Rix*, Gilb.

Law Ev. 56.

(2) *Piercy v.**Sir T. Jones*,

164. Gilb.

Law Ev. 65.

Style, 446.

*Cazenove v.**Vaughan*,

1 M. & S. 4.

*Williams v.**Williams*,

4 M. & S. 497.

(r) In *Pennsylvania*, any deposition taken by the rules of law, which could be read on the trial of the cause, may be read in evidence in any subsequent cause where the same matter is in dispute between the same parties, their heirs, executors, administrators, or assigns. *Act of 28th March, 1814, Laws of Penn. 6th vol. by Read, p. 908.*

In *Massachusetts*, a deposition taken in *perpetuum rei testimonium*, cannot be read in evidence, unless recorded within three months. *Bradstreet et al. v. Baldwin*, 11 *Mass. Rep.* 229.

In *New York*, the manner of perpetuating the testimony of witnesses, is pointed out and regulated by *Stat. 1 N. R. L. C. 31. Sess. 36. p. 455.*

A leading question must be objected to at the time of taking the deposition. *Sheeler v. Spear*, 3 *Binn. Rep.* 130. *S. P. Les. of Snyder et al. v. Snyder*, 6 *Do.* 483.

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In order further to explain what is before said, as to the necessity of the proceedings being regular, to make the depositions evidence, it may be necessary here to mention, that the distinction which has been taken in the books, as to the regularity of proceedings is this,—if the bill be dismissed because the plaintiff is irregular in his proceeding, as where a devisee, on a suit commenced by his devisor, brings a bill of revivor, and several depositions are taken, and then the cause on hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor; in this case, the depositions can never be read in any other cause, because there was no cause regularly before the Court: but if a cause was once properly before the Court, though the bill was dismissed because it was not a matter fit for equity to decree, the depositions will be evidence.

Blackhouse v. Middleton,
1 Ch. Cas. 175.
Smith v. Veale,
1 Lord Raym.
735.

General Rule
as to Chancery
Proceedings.

Rosh v. Rix,
Gilb. Law Ev.
56. Vide
5 Mod. 211.

Bryam v.
Booth,
2 Price, 234.

Blower v.
Ketchmore,
2 Keb. 31.

Case of Manchester v. Douglas,
Doug. 222,
note (13.)

Decree in
Chancery.

We have before seen that even a judgment, when destroyed, may be proved by secondary evidence: this rule applies universally to every species of evidence, and, therefore, where it appeared from the evidence of the proper officer, that the office had been searched, and the bill could not be found, the answer was permitted to be read without it, so ancient depositions have been received as evidence, without bill or answer: but to entitle a party to deviate so much from the general rule, they ought certainly either to be fortified by great length of time, or else some other reasonable evidence be given, that the bill had been once there, and in what way it had been lost.

The decree is evidence on the same principle as a judgment in a Court of Law, and subject to the like rules, viz. that where it respects private property or individuals, it is only evidence against parties to the suit, or others claiming through them (s) but when the question is of a public nature, it is then evidence against all persons standing in a similar situation with the parties to it.

While the decree remains in paper, it cannot be read in evidence for the purpose of proving its contents, without also proving copies of the bill and answer, unless they are recited at

Under the last *general interrogatory*, a witness examined under a commission, may, in his answer, state facts not drawn forth by the previous particular interrogatories. *Percival v. Hickey*, 18 Johns. Rep. 245.—AM. Ed.

(s) A decree in Chancery finding an *immaterial fact*, is not admissible in a subsequent suit at Law, between the same parties, to prove such fact. *Hotchkiss v. Nichols*, 3 Day's Rep. 138.

A decree in one case, cannot be used as a defence in another, where the subject matter is distinct and independent. *Lyon et al. v. Tallmadge et al.* 2 Johns. Cas. 501—AM. Ed.

length in it;(1) but when the only object of the evidence is to shew that a decree was in fact made, or the decree has been exemplified under the seal of the Court, and enrolled, is of itself evidence: and the opposite party may, in the latter case, shew that the point in issue in that suit was different from that before the Court.*

Of the same authority as answers, depositions,† and decrees of the Courts of Equity, are the depositions, answers to libels, and sentences in the *Ecclesiastical*(t) and *Admiralty*(u) Courts, on a question arising within their respective jurisdictions,(2)

Therefore, probate of a will of personal property, letters of administration,(3) or a sentence in a matrimonial cause in the one Court, or an adjudication of prize, &c. in the other, are evidence of the rights of the parties. The right to personal property, under a will, can be proved by no other evidence than the probate;(4) and while that exists, no person whatever can be permitted to shew that it was improperly granted, or after it is repealed to avoid any payment which has been made under it:(5) But it may be shewn that the seal to the probate was forged, or that letters of administration have been repealed,(6) to prevent any right being claimed under them, for that does not controvert the judgment of the Ecclesiastical Court, but shews that no such

(1) Lord
Thames v.
Patterson,
Bul.N.P. 235.

(2) Vide
Gilb. Law
Ev. 67.
2 Moul. 231.
Mildmay v.
Mildmay,
1 Vern. 53.

(3) Kempton
v. Cross, Cas.
Temp. Hard.
108.

(4) Rex v.
Inhabitants of
Northcote,
4 T. Rep. 258.

(5) Allen v.
Dundas,
3 T. Rep. 125.

* In the case of *Wheeler v. Lord, Guildhall*, 9 Ann. (Com. Dig. Ev. c. 1.) it was held by TAYLOR C. J. that if the bill and answer were recited in the decretal order, it was sufficient; but if only so much is recited as is deemed necessary to introduce the decretal part, the bill and answer must be proved. *Dougl.* 579. And doubts have been entertained whether the decree under seal, which does not state the bill and answer, can be read, without a foundation being laid for it by evidence of those proceedings. Vide *Trowell v. Castle*, 1 Keb. 91.

(6) Noel v.
Wills, 1 Sid.
359.
Chichester v.
Phillips, Sir
T. Raym. 405.

† In *Mildmay v. Mildmay*, a doubt was made whether depositions in the Spiritual Courts were admissible; it is clear they are not, when taken in any cause not within their jurisdiction, but where they have jurisdiction, there seems to be no objection. Vide *Gilb. Law Ev.* 67.

(t) In a libel for a divorce for adultery, the confession of the respondent alone, is inadmissible to prove the fact of adultery. *Baxter v. Baxter*, 1 Mass. Rep. 346. *Holland v. Holland*, 2 Do. 154.

(u) A sentence in a Court of Admiralty is sufficient evidence of a condemnation, without shewing the previous proceedings. *Gardner v. The Col. Ins. Co.* 7 Johns. Rep. 614.

In general, judgments and decrees are evidence only in suits between parties and privies. *Barr v. Gratz*, 4 Wheat. Rep. 320.

A decree of Admiralty, restoring to the claimant property, libelled as prize, was offered, in connection with other facts, as *prima facie* evidence that such property belonged solely to the claimant, was admitted. *Thompson v. Stewart*, 3 Con. Rep. 171.

By the general maritime law, a sentence of condemnation extinguishes the title of the original proprietors. *The Star*, 3 Wheat. Rep. 78.—AM. ED

Chap. II. s. 2. judgment exists. Proceedings in Foreign Courts.

So too, where an inferior Court grants probate, it may be proved that the testator left *bona notabilia*, (1) for that shews that the Ecclesiastical Court had no jurisdiction, and consequently, that the whole is void, as being *coram non judice*.* (v)

(1) *Ibid*.

* See further as to these sentences, post.

(v) The rules of evidence in Courts of Probates, are the same as in Courts of Common Law, unless altered by Statute. *Eveleth v. Cranch*, 15 *Mass. Rep.* 305.

A decree of a Court of Probate of Wills, is conclusive, and cannot be inquired into, until reversed or regularly set aside. *Bush v. Sheldon*, 1 *Day's Rep.* 170.

In *Massachusetts*, an administrator cannot prosecute or defend an action, in any of the Courts there, by virtue of letters of administration granted in another State. *Goodwin v. Jones*, 3 *Mass. Rep.* 514. *Borden v. Borden*, 5 *Do.* 67. *Stevens adm. v. Gaylord*, 11 *Do.* 256. *Langdon et al. adm. v. Potter*, *ibid.* 313.

In *Connecticut*, an administrator being appointed in the State where the deceased dwelt, may sue for the recovery of any property belonging to the deceased. *Nicole v. Mumford*, *Kirb. Rep.* 270.

So in *Pennsylvania*. *M'Cullough v. Young*, 1 *Binn. Rep.* 63. *S. C.* 4 *Dall. Rep.* 292.

But an executor qualified in *Demarara*, cannot act as such until qualified according to the laws of *Connecticut*. *Perkins v. Williams*, 2 *Root's Rep.* 462.

But letters of administration granted by the Archbishop of York, in Great Britain, are not sufficient authority to maintain an action in *Pennsylvania*. *Greene et al. v. Harris* 1 *Dall. Rep.* 456.

A decree of a Court of Probate is conclusive on the parties, until disaffirmed on appeal, or set aside in due course of law, and cannot be inquired into collaterally. *Sheldon v. Bush et al.* 1 *Day's Rep.* 170.

It is likewise conclusive in establishing a will. *Judson v. Luke*, 3 *Do.* 318.

Quere, If the probate of a will in *Rhode Island* be not conclusive, as well to real as to personal estate. *Spencer et ux. v. Spencer*, 1 *Gallia. Rep.* 622.

In *New York* the Courts do not take notice of letters testamentary, or letters of administration granted out of the State; and this is the law of *England* and most of the States. *Morrell v. Dickey*, 1 *Johns. Ch. Rep.* 153. *Williams et al. v. Storr*, 6 *Do.* 353. *Lee v. Bank of England*, 3 *Ves. Rep.* 44. Et vide in *Connecticut*, *Riley v. Riley*, 3 *Day's Rep.* 74. Et vide *Fenwick v. Sear's adms.* 1 *Cranch's Rep.* 259. *Goodwin v. Jones*, 3 *Mass. Rep.* 514. *Dixon's exrs. v. Ramsey's exrs.* 3 *Cranch's Rep.* 319. *Butts' adms. v. Price*, *Rep. in Ct. of Conf.* 68. But it seems a voluntary payment to an administrator is good. 6 *Johns. Ch. Rep.* 153.

The administrator who takes out letters of administration in one State, may in *Equity*, be called upon by a creditor to account for the assets in another. *Bryan et al. v. M'Gee*. *C. C. April*, 1809, *M. S. Rep.*

In the case of *Atkins v. Smith*, 2 *Atk. Rep.* 64, case 60, it was said by Lord Chancellor HARDWICK, that ecclesiastical jurisdictions are limited within their particular districts, and an administration taken out in *England* will not extend to the colonies in *America*; but if an executor sends over an exemplification of a probate to *Maryland*, or any other colony, the person who is employed as an agent there by the executor, may, by letter of attorney from him, collect in the effects of the testator, and he is chargeable as much as if the executor had got them in himself.

Where a testator leaves two wills, one in *Virginia*, and the other in *England*, the *English* will being the last in date, and his executor takes out letters of administration on the posterior will, in *England*, this does not *ipso facto* repeal letters of administration which have been granted in *Virginia*, on the first will; but the *English* executor must first qualify by giving bond and security as the law directs. *Bromley's adm. v. Duke et al.* 1 *Randolph's Rep.* 81.

From what has been already said, it may be collected that the probate of a will cannot be received as evidence for any purpose, in a question concerning freehold lands; for as to that they have no jurisdiction. (x) Chap. II. s. 2.
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The judgment, or sentence of a foreign Court, is received in our Courts as evidence of the right it establishes, or the fact directly found by it. Indeed, when the party who claims the benefit of it applies to our Courts to enforce it, and voluntarily submits it to their jurisdiction, they treat it not as obligatory to the extent to which it would be in the country where it was pronounced, nor to the extent to which by our law sentences and judgments are; (1) and therefore though in an action upon a foreign judgment, the judgment is *prima facie* evidence of the debt, it is not conclusively so; but our Courts will examine into it, and for that purpose, receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. (2)(y) In all other cases, our Courts give entire faith and (1) Per Eyre,
C. J.
2 H. Black.
409.
(2) Walker v.
Whitler,
Doug. 1.

Quere, What effect the recording in *Virginia*, of the exemplification of a will, and the probate thereof in the Prerogative Court of the Archbishop of *Canterbury*, will have in *Virginia*. *ibid.*—*Am. Ed.*

(x) The probate of a will is conclusive as to personal estate, while the letters testamentary remain unrevoked, but as to the realty it is only *prima facie* evidence. *Coates v. Hughes*, 3 *Binn. Rep.* 498. *Vangordon v. Vangordon*, cited 3 *Binn. Rep.* 506.

The probate of a will is *prima facie* evidence in *North Carolina*. *Stanley et ux. v. Kean*, *Tayl. Rep.* 93.

Quere, Whether the probate of a will in *Rhode Island* be not conclusive, as well as to real as to personal estate. *Spencer et ux. v. Spencer*, 1 *Gal. Rep.* 622.

A probate made *ex parte*, at the instance of defendant, in an issue then pending to try the validity of a will of later date, is not valid. *Hantz v. Hull*, 2 *Binn. Rep.* 511.

The certificate of the Register of wills, that a will of land had been duly proved and approved before him, and a copy thereof annexed, is *prima facie* evidence, although a copy of the probate is not set out. *Logan v. Watts*, 5 *Serg. & R. Rep.* 212.

The record of a will, like that of a deed, is only *prima facie* evidence of its authenticity. *Jackson ex d. Woodhull v. Rumsey*, 3 *Johns. Cas.* 234.

In *Connecticut*, a decree of a Court of Probates respecting a will, is conclusive as to real property. *Vide Bush v. Sheldon*, 1 *Day's Rep.* 170. *Judson et ux. v. Lake*, 3 *Do.* 318.

The copy of a will certified by the Clerk, without the seal of the Court, is evidence. *Rowland v. M'Gee*, 4 *Bibb's Rep.* 439.—*Am. Ed.*

(y) By the constitution of the *United States*, it is declared, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." *Art. IV. Sec. 1.*

By an Act of Congress passed the 26th of *May*, 1790, (2 *Laws, U. S.* 102,) the manner of authenticating legislative acts and judicial proceedings, is prescribed;

Chap. II. s. 2. credit to the sentences of foreign Courts, and consider them as conclusive.(1) Therefore, if a man be acquitted of a crime(2) committed in a foreign country, or discharged from a demand arising there(3) by the sentence of its Courts, or the validity of

(1) Per Eyre, ut supra.

(2) Hutchinson's case, 1 Show. 6.

(3) Burrows v. Jemino, 2 Show. 733.

"and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage, in the Courts of the State from whence the said records are or shall be taken."

In an action of debt in *Vermont* on a judgment obtained in *Connecticut*, the Court without reference to the Constitution of the *United States* or the Act of Congress, viewed it as a foreign judgment, and decided, that in a plea in bar to debt upon such judgment, it was necessary to aver that the judgment was obtained against the *lex loci* where it was rendered. *Waddams v. Burnham*, 1 Tyl. Rep. 233. Vide in *Connecticut*, *Smith v. Rhodes*, 1 Day's Rep. 168.

In *New York*, in an action of debt on a judgment obtained in *Pennsylvania*, the defendant pleaded *nil debet*, and the plaintiff took issue on it, and the Court therefore would not decide upon its propriety. *Rush v. Cobbett*, 2 Johns. Cas. 256. Et vide *Myers v. M'Lean*, 1 Johns. Rep. 509. S. C. 2 Do. 183.

In *Andrews v. Montgomery et al.* 19 Do. 162, it was decided, that a judgment, fairly obtained in another State, was conclusive evidence of a debt.

The rule that a plea which contradicts a record is bad, prevails as well when the action is brought in one State upon a judgment rendered in another, as in the Courts of the State where the judgment was rendered. *Field v. Gibbs*, 1 Peters' Rep. 157. Sed vide ante, p. 67. note (c.)

The general principle is, that the decision by a Court of competent jurisdiction in one nation, shall not be questioned in the Courts of another. *Cheriot v. Foussat*. 3 Binn. Rep. 250. Vide *Rogers v. Coleman et ux.* *Hardin's Rep.* 414. *Stewart v. Warner*, 1 Day's Rep. 142. *Jenkins v. Putnam*, 1 Bay's Rep. 8. *Rose v. Himeley*, 4 Cranch's Rep. 241.

The judgment of a Court having jurisdiction of the subject matter, is conclusive, and cannot be overhauled in a collateral action. *Rapelle v. Emory*, 2 Dall. Rep. 231. S. C. by the name of *Messier v. Armory*, 1 Yeates' Rep. 553. S. P. *Vasee v. Ball*, 2 Dall. Rep. 371, n. *Penhallow v. Doane*, 3 Do. 88. 103.

But captures on land from an enemy by unauthorised individuals, do not divest the original owner of the right of property, unless there has been some kind of condemnation or distribution made by some competent authority. *Turnbull v. Ross*, 1 Bay's Rep. 20.

In *New Jersey*, in an action of debt on a judgment in a foreign attachment in the Courts of *Pennsylvania*, the plea of *nil debet* was held good. *Curtis v. Gibbs et al.* *Pemning. Rep.* 399.

The rule is the same in *Pennsylvania*. *Betts v. Death*, *Addis. Rep.* 265.

In the case of *Lanning v. Shute*, 2 South. Rep. 778, it was held, that *nil debet* was a bad plea to a judgment obtained in *New York*.

Et vide *Mills v. Durjee*, 7 Cranch's Rep. 481. *Hampton v. M'Connel*, 3 Wheat. Rep. 234.

In the Circuit Court for the District of *Columbia*, the Court were divided whether *nil debet* was a good plea to an action founded on the record of a Court of *Virginia*, and the plea of *nil tuel record* was substituted. *Thompson v. Jameson*, 1 Cranch's Rep. 286.

In *Virginia*, a patent of land granted by the State of *North Carolina*, is entitled to "full faith and credit," under the Constitution of the *United States*, and its validity cannot be collaterally drawn in question. *Lassly v. Fontaine*, 4 H. & Munf. Rep. 146.

In *North Carolina*, in an action of debt on a judgment in a sister State, the plea

a marriage contracted there(1) be decided by such sentence, the sentence is conclusive of the fact established by it. So, if on a libel against a ship, any question arise on the law of nations, and a foreign Court of Admiralty, acting on that law, adjudge a

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(1) Per Lord
Hardwick,
1 Ves. 159.

of *nil debet* was held bad, and *nil tiel record* the proper plea, as the judgment was conclusive. *Wade v. Wade*, Rep. in Ct. of Conf. 486. Et vide *Anon.* 2 Bayw. Rep. 301.

The same rule is established in *South Carolina*. Vide *Coleman v. Guardian of Negro Ben*, 2 Bay's Rep. 485.

The Act of Congress does not include judgments obtained in the *Circuit Court of the U. States, for a particular State*, but only to judgments of a *State Court*. *Peppoon v. Jenkins*, 2 Johns. Cas. 119. *Col. Et Caines' Cas.* 136.

AS TO THE EFFECT OF A BANKRUPT'S AND INSOLVENT'S DISCHARGE.

Statutes of bankruptcy in one of the *U. States*, will not bind a creditor, who is not an inhabitant of that State, unless the contract were made there. *Proctor v. Moore*, 1 Mass. Rep. 198.

A discharge under a bankrupt or insolvent law of any State, is a good bar to an action brought in another State, of which the creditor is a citizen; the contract having been made within the State, and the debtor residing there at the time of making it. *Blanchard v. Russell*, 13 Mass. Rep. 1.

Where a contract was made in *Massachusetts* by one of its citizens with a citizen of *Pennsylvania*, and there was no provision where it was to be performed; a discharge of the debtor under the insolvent law of *Pennsylvania* was held to be no bar to an action upon such contract. *Bradford et al. v. Furrand*, 13 Mass. Rep. 18.

But where the parties were all citizens of another State, it was held a good bar. *Walsh v. Ferrand et al.* *ibid.* 19.

A discharge under a temporary insolvent law of *Jamaica*, by which debtors were released from all demands against them on surrendering their effects for the benefit of such of their creditors as should release within thirty days after public notice, was helden not to be intended to operate beyond the jurisdiction of the government where it was made. *Prentiss et al. v. Savage*, 13 Do. 20.

A person having a discharge under the insolvent laws of the State of *New York*, was held liable for money received by him, for the use of another, after his petition, and before the date of his certificate. *Pease v. Folger*, 14 Do. 264.

In *Connecticut*, a discharge under an Act of insolvency of that State, discharging the insolvent from all his debts may be pleaded *in bar* to an action of contract, entered into with citizens of another State, to prevent judgment against the defendant generally. *Minturn et al. v. Barber et al.* 1 Day's Rep. 136.

So where a creditor had recovered judgment on a contract made in *New York*, by parties there residing, from which the debtor had obtained a discharge under the insolvent law of that State, it was held that the creditor was entitled to an execution against the body and estate of the debtor. *Woodbridge v. Wright*, 3 Con. Rep. 523.

In *New York*, a discharge under the insolvent law of another State is no bar to a suit there, by a citizen of that State, for a debt contracted within it, and who has not in any degree come in under the proceedings under that insolvent Act. *Van Raugh v. Van Arsdaln*, 3 Caines' Rep. 154. *Smith v. Smith*, 2 Johns. Rep. 235.

A. residing in *Rhode Island*, gave his note dated in *Massachusetts*, to B. residing in that State, and afterwards was discharged by the insolvent law of *Rhode Island*, and removed to *New York*, where he is sued on the note, it was held that the discharge was no bar to the action. *Smith v. Smith*, 2 Johns. Rep. 235.

A discharge under the insolvent Act of *Connecticut*, by which the person of the

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ship to be a lawful prize, for breach of neutrality, being enemies property, or other fact, which by the law of nations is cause of forfeiture; the sentence is complete and conclusive evidence of the fact on which it is founded against all the world; and if they

debtor is protected from arrest and imprisonment, for any debt mentioned in the petition, is no bar to a suit, brought by such a creditor, in *New York*. *White v. Canfield*, 7 *Johns. Rep.* 117.

It is a principle of general practice among nations, to admit and give effect to the title of foreign assignees in cases of bankruptcy; but the mode of proceeding to recover the debts, depends on the form of proceedings in the country, and in the forum where the suit is instituted. *Bird et al. v. Caritat*, 2 *Johns. Rep.* 342.

Where a creditor and his debtor reside in the same State, and the debtor is there discharged under the insolvent law, and is afterwards arrested at the suit of the creditors in *New York*, for the same debt, the Supreme Court would not discharge him on common bail. *Sicard v. Whale*, 11 *Johns. Rep.* 194.

A. residing at *New Orleans*, drew a bill of exchange in favour of C. an inhabitant of *Tennessee*, on B. of *Pennsylvania*, which was protested for non acceptance, due notice of which was given to B. at *New Orleans*, who afterwards obtained a discharge of all his debts under the insolvent law of that State, in an action brought in *New York* by C. against B. it was held that B's discharge was a valid defence. *Hicks v. Brown*, 12 *Johns. Rep.* 142.

The discharge of a bankrupt or insolvent, operates according to the *lex loci* on the contract, where it was made or is to be executed, *ibid.* *S. P. Smith v. Smith*. 2 *Johns. Rep.* 235.

A person who had been arrested in another State, and discharged from imprisonment under an Act of the Legislature of that State, may be arrested and held to bail for the same cause of action, at the suit of the same plaintiff. *Peck v. Hozier et al.* 14 *Johns. Rep.* 346.

In *New Jersey* it has been decided, that the Act of Assembly of *Pennsylvania*, passed 13th March, 1812, for the relief of insolvent debtors in the city and county of *Philadelphia*, is a bankrupt law, and against the Constitution of the U. States, and void. *Vanuxem et al. v. Hazlehurst*, 1 *South. Rep.* 192.

In the case of *The Farmers' & Mechanics' Bank v. Smith*, 3 *Serg. & R. Rep.* 63, this Act of Assembly was held constitutional; but upon a writ of error to the Supreme Court of the U. States, the judgment was reversed. 6 *Wheat Rep.* 131.

A similar decision was made on the Act of 3d April, 1801, of *New York*. *Olden exrs. v. Hallet*, 2 *South. Rep.* 466.

Where a citizen of *New Jersey* contracted a debt in *Pennsylvania*, and was sued in *New Jersey*, and pending the suit goes to *Pennsylvania*, and was arrested there by other creditors, and then discharged under the insolvent law of that State, an *exoneretur* was ordered on the bail piece in the suit in *New Jersey*. 1 *Holst. Rep.* 148.

In *Maryland*, a defendant was discharged from a *ca. ex.* upon his producing his release under an insolvent law of *Pennsylvania*. *McKim v. Marshall*, 1 *Har. & Johns. Rep.* 101.

In *Pennsylvania*, a discharge under an insolvent law of *Maryland*, though the Act was passed subsequent to the debt in question, and to the institution of the suit, was held to protect the person of the debtor, who was a resident of *Maryland*. *Miller v. Hall*, 1 *Dall. Rep.* 229. *Thompson v. Young*, *ibid.* 234. *Donaldson v. Chambers*, 2 *Do.* 100.

The rule is to discharge on common bail, in cases where the debtor was discharged by the bankrupt law of the State or Territory where the debt was contracted, and where he resided, unless such State refuses to extend the same courtesy to the citi-

state the evidence from which they drew the conclusion, no Court in this country can take into their consideration, whether such conclusion was right or otherwise (1) (z) Nor will the sentence be void on account of the Court having arrived at the conclusion

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(1) Vide
Park's Insur.
353.
Garels v. Ken-
sington,
8 T. Rep. 230.
Christie v. Se-
cietan,
8 T. Rep. 199.
Ibid.

zens of Pennsylvania, and it will be presumed it does, unless some reason be shewn to the contrary. *Smith v. Brown*, 3 Binn. Rep. 201.

This courtesy exists between Pennsylvania and Maryland. *Hilliard et al. v. Greenleaf*, 2 Yeates' Rep. 533. S. C. 5 Binn. Rep. 336. n. *Bagges v. Teacle*, *ibid.* 332.

So with S. Carolina. *Hare v. Moultrie*, 2 Yeates' Rep. 435.

But it does not with New York. *Fisher v. Hyde*, 3 Yeates' Rep. 256.

Nor with the District of Columbia. *Walsh et al. v. Nourse*, 5 Binn. Rep. 381.

In the case of British subjects, the discharge under the bankrupt laws of England will protect the person of a bankrupt in Pennsylvania. *Harris v. Mandeville*, 2 Dall. Rep. 256. S. C. 2 Yeates' Rep. 99.

Where the debt was contracted and made payable out of the State in which the discharge took place, the Circuit Court will not discharge the defendant on common bail. *Campbell et al. v. Claudius*, 1 Peter's Rep. 484.

A discharge of the person only, under a foreign insolvent law, will not entitle the debtor to an *exoneretur* in the Circuit Court, *aliter*, if the contract be discharged. *Webster v. Massery*, C. C. April, 1808, M. S. Rep.

The insolvent laws of Pennsylvania are considered as those of a foreign country, in this respect. *ibid.*

Where the person of the defendant had been discharged under the insolvent law of Pennsylvania, of which the plaintiff had due notice, and the debt was contracted there, the Circuit Court discharged him on common bail, but would not quash the *captias*. *Read v. Chapman*, 1 Peter's Rep. 404.

An insolvent debtor who has been discharged in New York, and assigned among other articles a horse in the possession of a citizen of Pennsylvania, cannot afterwards bring *trover* for him. *Tretor v. Robinson*, 7 Serg. & R. Rep. 182.

The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the U. States. *Harrison v. Sterry*, 5 Cranch's Rep. 289. *M. Neil v. Colquhoun*, 2 Hayw. Rep. 25. Vide *Bizzel v. Bedient*, 2 Carolina Law Repos. 354.

A discharge under a foreign bankrupt law, is no bar to an action, in the Courts of this country, on a contract made here. *M. Millan v. M. Neil*, 4 Wheat. Rep. 209.—Am. Ed.

(z) If the sentence of a foreign Court be free from ambiguity, so as not to require aid from any other part of the record to explain the ground on which it went, no other part of the record can be read. *Marsh v. Un. Ins. Co.* C. C. April. 1810, M. S. Rep.

But the record may be referred to, for the purpose of shewing that no claim was put in, or that it was untrue and fraudulent, or by misconduct of the captain, or to shew what papers were found on board and the like. *ibid.* S. P. *Assuria et al. v. Ins. Co. Penn.* C. C. Oct. 1812, M. S. Rep.

If the sentence of a foreign Court shew the ground of condemnation, no other part of the proceeding need be produced. *Bouquesbie v. Girard*, C. C. Oct. 1808, M. S. Rep.

In *Marshall v. Parker*, 2 Camp. Rep. 69, it was decided, that as a foundation for introducing the sentence in evidence, the capture must be proved.

In an action of *trover* brought by the original owner of a vessel which had been abandoned, and a wreck, and sold according to the laws of Spain, in cases of wreck

P.

Chap. II. s. 2. on rules of evidence, or presumptions established by particular Proceedings in Foreign Courts.

ordinances, and *not generally acknowledged*.⁽¹⁾ In this case, however, the adjudication is only evidence of the *conclusion* on which the condemnation is founded, such as the property belonging to an enemy, or the like, and not of the *facts* stated by way of evidence.

(1) Bolton v. Gladstone, 5 East, 155. 2 Taunt. 85. Baring v. Roy, Ex. Ass. Co. 5 East, 99.

or derelict, the property by the sale was transferred to the purchaser, who thereby acquired a valid title against all the world. *Grant et al. v. M. Lachlin, & Johns. Rep. 34.*

The sentence of a foreign Court of Admiralty, is not *conclusive evidence* as to the character of the property, and of a breach of warranty of neutrality. *Vandenheuvel v. Un. Ins. Co. in Er. reversing the Judgment of the Supreme Court. 2 Johns. Cas. 451. S. C. 2 Caines' Cas. in Er. 217. S. P. Johnson et al. v. Ludlow, 1 Caines' Cas. in Er. XXX. S. C. 2 Johns. Cas. 481. S. P. Laing v. Un. Ins. Co. in Er. ibid. 487. Goix v. Low in Er. ibid. 480. Kemble et al. v. Rhinelanders et al. 3 Johns. Cas. 130. Radcliff et al. v. Un. Ins. Co. 9 Johns. Rep. 277. Contra same cases in Supreme Court, viz. Goix v. Low, 1 Johns. Cas. 344. Laing v. Un. Ins. Co. 2 Do. 174. Ludlow et al. v. Dale, 1 Johns. Cas. 16. S. C. 2 Caines' Cas. in Er. 348. S. P. Huskin v. New York Ins. Co. and Vandenheuvel v. Church, 2 Johns. Cas. 173. n. Greving v. Un. Ins. Co. 1 Nott & M'Cord's Rep. 557. Bailey v. So. Car. Ins. Co. ibid. 541. n.*

The decision of a prize Court is conclusive as to the property, in an action of trover. *Wheatwright v. Depeyster, 1 Johns. Rep. 471.*

Sentence of condemnation is *prima facie* evidence of blockade. *Radcliff v. Un. Ins. Co. 9 Johns. Rep. 277.*

In an action on a policy of insurance, a sentence of condemnation by a foreign Court, is conclusive evidence of those cases of condemnation only which it distinctly states. *Robinson et al. v. Jones, 3 Mass. Rep. 536.*

Nor will such sentence be conclusive, and perhaps not even *prima facie* evidence of the existence of such cause, unless it appear a trial was had, in which the parties had an opportunity to be heard. *Sawyer et al. v. The M. Fire & M. Ins. Co. 13 Mass. Rep. 291.*

And if the decree be reversed by the Court of Appeals, the reversal will be conclusive evidence that the facts stated did not exist. *Cleveland v. The Un. Ins. Co. 3 Mass. Rep. 308. Dorr v. The same, ibid. 494.*

The sentence of a Court of Prize is not conclusive to establish any particular fact, without which it may have been rightly pronounced. *Maley v. Shattuck, 3 Cranch's Rep. 487. Vide Fitzsimmons v. Newp. Ins. Co. 4 Cranch's Rep. 197. 1 Hall's Am. Law Journ. 139.*

The sentence of a foreign Court of Admiralty condemning a vessel for a breach of blockade, is conclusive of that fact in an action on the policy. *Croudson v. Leonard, 4 Cranch's Rep. 434. 1 Hall's Am. Law Journ. 148. Et vide The Maryland Ins. Co. v. Woods, 6 Cranch's Rep. 29.*

The sentence of condemnation of a foreign Court of competent jurisdiction, cannot be avoided for fraud, when collaterally called in question. *Stewart v. Warner et al. 1 Day's Rep. 142.*

The sentence of a foreign Court of Admiralty, condemning property as prize, is conclusive evidence, not only of its *direct effects*, but also as to the *facts directly decided by it*. *Brown v. Ins. Co. Penn. 4 Yeates' Rep. 119. S. C. in High Court of Error, by name Dempey v. Ins. Co. Penn. 1 Binn. Rep. 299. n. Per Washington J. Croudson v. Leonard, 4 Cranch's Rep. 434.*

After the decision of *Dempey v. Ins. Co. Penn.* the Legislature of Pennsylvania,

Also, if a foreign Court of Admiralty condemn a ship as law-ful prize without assigning any cause, it is evidence that she was not neutral (1)(a) but if the foreign Court state the facts

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by Act of 29th March, 1809, 5 Sm. L. 49, declared, that no sentence of a Foreign Prize Court should be conclusive of any facts, except the acts and doings of said Court. If a foreign Prize Court of general jurisdiction has decided that a seizure was made conformably with their law, its decree is conclusive upon this point. *Cheriot v. Fousat*, 3 Binn. Rep. 220. Et vide *Baxter et al. v. The N. Eng. Mar. Ins. Co.* 6 Mass. Rep. 277. S. C. 7 Do. 275. *Russell v. The Un. Ins. Co. & Dall. Rep.* 421. *Brown v. The Un. Ins. Co. & Day's Rep.* 179. *Mur. Ins. Co. v. Woods*, 6 Cranch's Rep. 45.

(1) *Saloucci v. Woodmass*, Park, 413.
Saloucci v. Johnson, Park, 415.

But the jurisdiction of a foreign tribunal may be inquired into, both as respects the authority from which it has emanated, and the subject matter over which it is exercised. *Cheriot v. Fousat*, 3 Binn. Rep. 220.

The sentence of a French Court of Admiralty, condemning an American vessel and cargo, under the Milan decree, is conclusive upon the Courts of this country, so as to change the property, although the decree on which it is founded is repugnant to the law of nations, and although those Courts do not acknowledge the conclusive effect of the sentence of foreign prize Courts. *Armoyd et al. v. Williams et al.* C. C. April, 1811, M. S. Rep.

The condemnation of an illegal tribunal is not binding; and if the source of the authority under which it was constituted, be contrary to the usual mode of constituting Courts, he who would support the sentence, must prove its legitimacy. *Snell v. Fousat*, C. C. April, 1805, M. S. Rep. S. C. 3 Binn. Rep. 239, n. *Cheriot v. Fousat*, 3 Binn. Rep. 220. But a foreign Court, the origin of which does not appear, is to be presumed legitimate. *ibid.*

Where a libel in a foreign Court of Admiralty set forth several contradictory causes of condemnation, and the decree was general, and did not specify any particular cause of forfeiture, it was held, that the sentence was not conclusive, and that the assured might prove it was American property. *Vasse v. Ball*, 2 Dall. Rep. 270. S. C. 2 Yeates' Rep. 178. S. P. *Crousillat v. Ball*, 3 Yeates' Rep. 375. *Blacklock v. Stewart*, 2 Bay's Rep. 363.

If a policy of insurance contain a warranty of American property, with a proviso that if called in question, it shall be sufficient for the assured to prove it in any Court of the U. States, the underwriter may combat the fact by reading the proceedings of a foreign Court of Admiralty as evidence, though not conclusive. *Galbreath v. Gracie*, C. C. April, 1805, M. S. Rep. S. C. cited 1 Binn. Rep. 296. n. *Calhoun v. Ins. Co. Penn.* 1 Binn. Rep. 293.

The judgment of a foreign Court of competent jurisdiction, is *prima facie* evidence of the points adjudged. *Smith v. Williams*, 2 Oaines' Cas. in Er. 110. *Radcliff v. U. S. Ins. Co.* 9 Johns. Rep. 277.

Quere Virginia. *Hadfield v. Jameson*, 2 Munf. Rep. 53. *Bourke v. Granberry*, 1 Gilmer's Rep. 16.

The sentence of a Court of Admiralty is only *prima facie* evidence of any fact, and will have no effect if sufficient appears in it to rebut such presumption. *Johnston v. Ludlow*, 2 Johns. Cas. 481. S. C. 1 Oaines' Cas. in Er. XXIX. S. P. *Loing v. Un. Ins. Co.* 2 Johns. Cas. 487.—Am. Ed.

(a) Vide ante *Vasse v. Ball*, 2 Dall. Rep. 270. S. C. 2 Yeates' Rep. 178.

When it does not appear, by the decree itself, on what particular ground the condemnation was had, the case is to be open as to all the points which it may be necessary for the parties in interest to establish, except the fact of condemnation. *Johnston et al. v. Jones*, 3 Mass. Rep. 536.—Am. Ed.

Chap. II. s. 2. on which they found their condemnation, and it appear from Proceedings in Foreign Courts.

those facts, and also from the conclusion they have drawn, that the condemnation was not for any violation of the law of nations, but for not complying with some arbitrary regulation of their own; as where a belligerent State having made certain ordinances which had not been assented to by a neutral State, seized a ship belonging to such state, and declared her prize, because she had not navigated according to those ordinances, the sentence is void altogether, and of no force in any Court of Justice.

(1) *Calvert v. Bovil*, 7 T. Rep. 523.
Myne v. Walter, Park, 414.

Pollard v. Bell, 8 T. Rep. 434.
Bird v. Appleton, *Ibid.* 562.

(2) *Havelocke v. Rockwood*, 8 T. Rep. 268.

(3) *Oddy v. Bovil*, 2 East, 473.

(1) In like manner, as it is necessary that the *subject* should be within their jurisdiction, it is also necessary that the *Court* itself should be one regularly established, and acknowledged by the law of nations, and not a mere arbitrary institution; wherefore a condemnation before the Consul of a belligerent State, resident in a neutral country, was considered as a mere nullity; (2) but such a proceeding before the Consul of one belligerent State resident in another, in alliance offensive and defensive with it, has the same effect as if taken in the State appointing the Judge who condemns; for the interests of the two States being united, one may authorise the other to erect a Court, acting on the law of nations, for their common benefit, at any place within the hostile territory. (3) (b)

The proof of these proceedings has generally been by copies under the seal of the Court in which they were; (c) there seems to be no objection to the seal of a Court acting on the *law of na-*

(b) The Admiralty Court should not only have jurisdiction of the subject matter, but should be constituted in conformity with the laws of nations, and if deficient in either of these qualifications, the sentence of such Court is not conclusive, and its jurisdiction may be inquired into by a Court in another country, when the question is, whether the right of property has been changed. *Ross v. Himely*, 4 Cranch. Rep. 241. See vide *Hudson et al. v. Gustier*, *ibid.* 393. *Wheelwright v. Depeyster*, 1 Johns. Rep. 471. *Cheriot v. Fousat*, 3 Binn. Rep. 220.

In *Cheriot v. Fousat*, the Court likewise decided that seizure and safe possession are all that are necessary to give jurisdiction, and whether that possession be within the dominions of the captor, or of a neutral, is immaterial.—AM. ED.

(c) A paper, purporting to be a decree of a foreign Court of Admiralty, not certified under the seal of the Court, cannot be read to the jury in an action between the assured and the underwriter, in consequence of having been exhibited by the former to the broker of the latter as one of the proofs of loss. It is only evidence of the fact of such communication having been made. *Thurston v. Murray*, 3 Binn. Rep. 328.

The proceedings of a *Portuguese Court*, certified under the seal of one who states himself to be the Secretary of Foreign Affairs in *Portugal*, are not evidence. *Church v. Kubbart*, 4 Cranch. Rep. 187.

By if the decrees of the *Portuguese colonies* be transmitted to the seat of government, and registered in the department of state, a certificate of that fact under

tions, being received as evidence of itself; but in my first edition, I hazarded an opinion, that to prove the seal of a mere municipal Court, some evidence should be given of its authenticity (1) and a case which has been since determined in the Court of King's Bench has confirmed that opinion; for in an action on a judgment obtained in the island of *Grenada*, though the plaintiff proved the hand-writing of the Judge of the Court subscribed to the judgment, yet, as he could not prove the seal affixed to be the seal of the island, he was considered as having failed in his proof, and the Court, on motion, confirmed the nonsuit obtained on that ground. Nevertheless, as the Court did not go much at length into the reason for requiring such evidence, it may not be improper to retain the note which was inserted in the former edition. (d) *

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(1) *Henry v. Adey*,
3 East, 221.

the great seal, with a copy of the decree authenticated in the same manner, would be *prima facie* evidence. *ibid.*

A copy of proceedings of a foreign tribunal, produced under the seal at arms of the Minister of the kingdom, is not even *prima facie* evidence, unless it appear that the Minister has the official custody of such proceedings. *Vandervoort et al. v. Smith*, 2 Coines' Rep. 155.

A paper purporting to be a judicial proceeding, authenticated under a national seal, will be taken notice of judicially, as having the highest evidence of authenticity. *Griswold et al. v. Pitcairn*, 2 Con. Rep. 85.

The copies of a record attested by the Register of the Court in a foreign country, are not admitted as evidence, without a certificate of the Judge that he is the Register. *Spegail v. Perkins*, 2 Root's Rep. 274.

Where the plaintiff produced a copy of the Vice Admiralty records of *Bermuda*, and proved the hand writing of the Judge and of the Register of the Court to the certificate that these papers were a true copy from the records, the Court admitted them. *Mumford v. Bowne*, Anth. N. P. Cas. 25.—AN. ED.

(d) *Quere*, Whether the seal of a Court of Admiralty, is not of itself evidence *Gardere v. The Col. Ins. Co.* 7 Johns. Rep. 514. In *Connecticut*, it proves itself. *Thompson v. Stewart*, 3 Con. Rep. 171.

The certificate of a notary public under his notarial seal, is *prima facie* evidence, that the person who uses it, is a Notary commissioned by the Governor. *Browne v. Phil. Bank*, 6 Serg. & R. Rep. 484.

Letters of administration under the seal of the Court of Probates, in due form of law will be deemed regular and valid. *Wentcott et al. v. Cady et al.* 5 Johns. Ch. Rep. 334.

As to the manner of proving the seal of a foreign government, Vide *U. States v. Palmer*, 3 Wheat. Rep. 610. *The Estrella*, 4 Do. 298.—AN. ED.

* It was *held*, in an anonymous case, 9 *Mod.* 66, that an exemplification of the proceedings of a Court in *Holland*, under the seal of the *States*, was sufficient evidence without further proof; but this, I conceive, is not an authority to shew that the seal of the Court in that country, acting on its own laws, would have been sufficient; and the case of *Swinnerton v. Goddard*, therein cited, seems to warrant the distinction; for it was there *held*, on appeal to the House of Lords, that an exemplification of a judgment of the Court of King's Bench in *England*, which (for aught appearing to the contrary, was under the seal of that Court) was not sufficient evi-

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Vide Clegg v.
Levy,
3 Campb. 169.
Miller v.
Heinrick,
4 Campb. 155.
Buchanan
v. Rucker,
1 Campb. 63.
Richardson
v. Anderson,
there cited,
and 1 P. Will.
431.

It was before observed, that if a man be acquitted of a crime, or discharged from a demand in a foreign country, he cannot be again impleaded on the same account in this. It may be added, that all matters of contract or of right are to be judged of according to the law of the country wherein they arise; in such cases, therefore, the laws of foreign countries frequently become

denote of the judgment before the Court of Session in Scotland. It is true that the distinction taken by the Court was, that in the one case the record was the direct matter in issue, and in the other but inducement. But, in addition to this, it may be observed, that the public seal of one State is matter of notoriety, and may be taken notice of by another, as part of the law of nations acknowledged by all; but when only the seal of a foreign Court is put to the copy, it should seem that some evidence should be given of that seal being what it purports to be; for the Courts of England cannot judicially take notice of the laws of other countries; and, therefore, where a contract is to be construed according to the laws of the country in which it was made, witnesses are examined to prove what those laws are. 1 P. Will. 431. A distinction has long prevailed between public and private seals; the first (those of the superior Courts in this country) are considered, as is observed above, as part of the law of the country, and therefore are judicially taken notice of by its Judges; but the seal of a private Court, or private individual, should be proved by evidence. Vide Gilb. Law Ev. 90. In *Masses v. Thornton*, 8 T. Rep. 303, it was held that the bare production of an instrument, purporting to be a diploma under the seal of the University of St. Andrew's, was not sufficient: but in the case of *Dee* decd. *Woodmass v. Mason*, 1 Esp. Cas. N. P. 53, the seal of the Corporation of London was held to prove itself. From what is said by the Court in *Masses v. Thornton*, it may be collected that the like evidence would not be sufficient of the seals of other English corporations, and there appears good reason for making a distinction between them and that of the Corporation of London; its privileges have been confirmed by Parliament, and its seal is so common as to be known to almost every man.

Letters of administration under the seal of the Prerogative Court of Canterbury, prove themselves in a cause respecting personal property. *Kempton v. Cross*, Cas. temp. Hard. 108. And where a bill of exchange has been protested in a foreign country for non-acceptance or non-payment, the protest under the seal of a notary public has been usually received as sufficient evidence of the presentment, without proof even of the protest having been signed by him, or that the seal affixed is what it purports to be. Vide 2 Roll. Rep. 346. 10 Mod. 66. This seems to be a relaxation of the strict rules of evidence for the convenience of the mercantile world; who in such cases, give credit to instruments of that nature.†

† Notarial writings may with propriety be considered as public writings not judicial; although there are cases in which they receive the respect and efficacy of such. Vide *Church v. Hubbard*, 2 Cranch's Rep. 187. *Yeaton v. Fry*. 5 Do. 335. But a notarial certificate is generally confined to bills of exchange, &c.

A notarial protest is evidence of notice to the endorser of a promissory note, and of non payment by the drawer. *Browne v. Philadelphia Bank*, 6 Serg. & R. Rep. 424.

The protest of a promissory note is no evidence by itself, the demand and notice must be proved as if no protest had been made. *Cumming v. Fisher*, Auth. N. P. 1.

Quere, Whether a notarial protest be conclusive evidence of the lawfulness of money tendered. *Seawright v. Calbraith*, 4 Dall. Rep. 325.

Quere, Whether between contending parties, the certificate of a notary public,

the subject of inquiry in our Courts of Justice, and when such a question arises, the foreign law, if in writing, must be proved by a copy properly authenticated. But when the unwritten laws of a foreign country become the subject of inquiry, such laws are proved by the parol examination of witnesses of competent skill and knowledge.^(c)

that he is "duly commissioned and sworn," can be contradicted. *Fennick v. Sears's adm.* 1 *Oranch's Rep.* 259. Vide *Spegall v. Perkins*, 2 *Roof's Rep.* 274.

The certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought not to be received in evidence; but the deposition of the notary public, or some equivalent testimony ought to be produced. *Kidd's adm. v. Alexander's adm.* 1 *Randolph's Rep.* 456.

In *Garvey v. Hibbert*, 1 *Jacob & Walk.* 180, money was ordered to be paid under a power of attorney, executed in *North America*, attested by a notary public, and verified by the Secretary of State of the country.

The notarial copy of an agreement registered in *Philadelphia*, respecting the loading of a vessel insured, the original being in the hands of the agent of the plaintiff abroad, is not evidence in an action against the underwriters, not being parties or privies thereto. *Donath et al. v. Ins. Co. North America*, 4 *Yeates' Rep.* 275.

Notarial copies of instruments executed in a foreign country, are not in themselves evidence. *Mauri v. Heffernan*, 13 *Johns. Rep.* 58.

The exemplification of a decretal order of the Court of Chancery, is not admissible evidence on a trial in a Court of Law, but the original decree must be produced. *Wilson et al. v. Conine*, 2 *Johns. Rep.* 230.

Where a bill of exchange is lost, on proof of that fact, a notarial copy may be given in evidence. *Anderson v. Robeson*, 2 *Bay's Rep.* 495.—AM. ED.

(c) Where the great seal of a State is affixed to the exemplification of the Act of the Legislature, the attestation of a public officer is not required under the Act of 1790. *U. States v. Johns*, 4 *Dall. Rep.* 413.

A printed pamphlet, containing Legislative Acts, not authenticated by the seal of the State, is not evidence in any other State, under the Act of Congress. *Craig v. Brown*, 1 *Peters' Rep.* 352.

But a copy of an Act of Assembly of another State, contained with other Acts in a pamphlet, printed by the printers of the Commonwealth, was held to be good evidence. *Thompson v. Musser*, 1 *Dall. Rep.* 462, *S. P.* *Biddis v. James*, 6 *Binn. Rep.* 321. Contra, *Commonwealth v. Frazier*, cited, *ibid.* 323.

Copies of the laws of *Pennsylvania*, printed under the authority of the Legislature, are evidence in this State, whether the laws be public or private. *Biddis v. James, ibid.*

The written or Statute laws of foreign countries must be proved by the laws themselves, if they can be procured: if not, inferior evidence may be received. Unwritten laws or usages may be proved by parol evidence, and when proved, it is for the Court to construe them, and decide upon their effect. *Consequa v. Willing et al.* 1 *Peter's Rep.* 325. *Seton v. Del. Ins. Co. C. C. April*, 1808, *M. S. Rep.* *Robinson v. Clifford, ibid.* 1807.

How a manuscript copy of an Act of Assembly must be authenticated. *Havisten v. Cole*, 1 *Randolph's Rep.* 461.

The common law of a foreign country may be proved by respectable witnesses; but foreign Statutes cannot be proved by parol. *Kenny v. Clarkson et al.* 1 *Johns. Rep.* 385. Vide *Smith v. Elder*, 3 *Do.* 405. *Woodbridge v. Austin*, 2 *Tyl. Rep.* 367.

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Vide Com.
Dig. Evid.
(C.) 1.

(1) Chandler
v. Roberts,
Excheq. Trim.
39 Geo. 3.

(2) Fisher v.
Lane, 2 Black.
836.

(3) Arundel
v. White,
14 East. 316.

(4) Vide
Herbert v.
Conke, Willes
36, note (a)

Judgments in a Court baron, County Court, or other inferior Court, though not records, are also evidence. In cases, however, where it has been requisite to prove their proceedings, the general practice has been to produce the book containing the original minutes, as well those previous to the judgment, as the judgment itself, (for in the case of all inferior jurisdictions, whether ecclesiastical or civil, it must be shewn that the proceedings are regular;) and as it is not usual to draw up such judgments in form, this evidence has been held sufficient to support an action on the judgment of the County Court,(1) or to prove the proceedings in a foreign attachment in the Court of the Lord Mayor of London,(2) or a discontinuance(3) of a suit in the Sheriff's Court there: but in this case the defendant is not precluded by the judgment from disputing the original jurisdiction of the Court, and pleading that the cause of action arose out of that jurisdiction,(4) (f)

But unless positively shewn to be in writing, they may. *Livingston v. Maryl. Ins. Co.* 6 *Cranch's Rep.* 280.

Copies of the proceedings or decrees of foreign tribunals, though under the hands and seals of the officers of such Courts, must be proved like other writings. *Delafield v. Hand*, 3 *Johns. Rep.* 310. But those of a foreign prize Court are evidence when under its seal certified by a deputy registrar, whose official character is certified by the Judge, and his by a notary public; it being a Court of the law of nations. *Yeaton v. Fry*, 5 *Cranch's Rep.* 343.

To prove a condemnation in a foreign prize Court, it is only necessary to produce *the libel and the sentence*. *Maryl. Ins. Co. v. Hodgson*, 6 *Cranch's Rep.* 230. But the depositions read by the plaintiff in a suit on a policy of insurance, merely to prove the condemnation, are not evidence to prove any other fact. *ibid.*

The decrees alone has been held sufficient to prove condemnation, if it state the material facts. *Gardiere v. The Col. Ins. Co.* 7 *Johns. Rep.* 519. Et vide *Jones v. Randall*, 1 *Cowp. Rep.* 17.

To entitle *foreign letters testamentary*, to be read in evidence, the seal affixed to the probate must be proved. *Dirckheim v. Myers*, *Dist. Ct. Phil.* 1819. *M. S.*

The exemplification of a will made in *England*, and certified generally to have been proved in the Prerogative Court of *Canterbury*, under the seal of that Court, may be read in evidence. *Les. of Westons v. Stammers*, 1 *Dall. Rep.* 2. And the probate of a will, under the seal of that Court, not recorded here, allowed to be read to prove title to lands. *Morris' les. v. Vanderen*, 1 *Dall. Rep.* 66.

Marine Ordinances of foreign countries promulgated by the Executive by order of the President of the *U. States*, may be read in the Courts of the *U. States*, without further proof. *Talbot v. Seaman*, 1 *Cranch's Rep.* 1.

But the *municipal laws* of foreign countries are generally to be proved as facts. *ibid.* *Church v. Hubbard*, 2 *Do.* 237. *Frith v. Sprague*, *adx.* 14 *Mass. Rep.* 455. —*Am. Ed.*

(f) In order that a judgment shall have any binding effect, it is essential that the Court have jurisdiction of the person and subject matter, the want of which makes the judgment utterly void and of no effect. *Borden v. Fitch*, 15 *Johns. Rep.* 121. Et vide *Gelston v. Hoyt*, 3 *Wheat. Rep.* 246. Vide *Armstrong v. Carson's exrs.* 2 *Dall. Rep.* 393.

If the parties think proper to submit their differences to an arbitrator; his judgment is as conclusive upon them, as that of a Court established by the law; and though in questions respecting land, he cannot absolutely convey property from one to another, but can only order it to be done; yet if he determine the right to be in one, this is conclusive evidence of the title, and cannot be disputed in an action of ejectment. (1) (g) The

(1) Doe dem. Morris v. Roper, 3 East, 15.

The certificate of a justice of the peace was held to be *prima facie* evidence, and not being questioned, was sufficient to support a judgment on it in debt. *Kellogg v. Manney, 2 Johns. Rep. 376.* But in the case of *M. Carty et al. v. Sherman, 3 Do. 429*, was held not to be sufficient on a plea of *nulla in re record*, even where the justices' hand-writing was proved by a witness; but it should be proved by the justices himself, or a sworn copy of his minutes be produced.

The sentence of a Court Martial, which has no jurisdiction over the case, is not conclusive evidence in an action brought in another Court. *Wife v. Withers, 3 Cranch's Rep. 331.* Vide *Ferguson v. Barron, 2 Dall. Rep. 113.*

The decisions of the board of property in Pennsylvania, are received as evidence, but have never been supposed to be conclusive, either as to the law or fact. *Carothers et al. v. Les. of Dummings, 3 Serg. & R. Rep. 379.* In Maryland, vide *West v. Jarrett, 1 Har. & Johns. Rep. 538.*

A final account settled by the administrator with the Orphans' Court, is not conclusive evidence in his favour. Upon an issue of *devastavit vel non* in an action, by a creditor, it being *res inter alios acta*. *Beatty v. State of Maryland, 7 Cranch's Rep. 281.*—AM Ed.

(g) In Massachusetts there are two modes of submission to arbitration, besides those authorised by the common law; the one, by entering a rule for that purpose before a justice of the peace; the other, by a reference of an action in Court, which may comprehend all other demands than those for which the suit is brought. *Commonwealth v. The Pejepscut Proprietors, 7 Mass. Rep. 399*

In a submission under the Statute of 1786, c. 21, the Statute must be strictly pursued. *Monist v. Post et al. 4 Mass. Rep. 532.* *Jones v. Hacker, 5 Do. 264.* *Mott v. Anthony, ibid. 489.* *Short v. Pratt et al. 6 Do. 496.* *Boardman v. England, ibid. 70.*

A submission of an action to referees, by a rule of Court, operates as a waiver of all exceptions to the forms of process. *Forrest v. Shaw, 10 Mass. Rep. 253.*

So in Virginia. *Ligon v. Ford, 5 Munf. Rep. 10.*

Where an action is submitted to referees, under a rule of Court, neither party can at his pleasure rescind the rule, and revoke the submission, nor can the plaintiff discontinue, or become nonsuit, without defendant's consent. *Haskell v. Whitney, 12 Mass. Rep. 47.*

In Vermont, after a submission, either party may revoke the same, and an award afterwards will not be held valid. *Bathway v. Strong, 2 Tyl. Rep. 103.*

Where the submission is on a bond, whether revocable or not, either party may revoke it, before the award be made and published, and leave the injured party to his remedy on the bond. *Aspinwall v. Tenney, ibid. 329.* *Allen v. Watson, 16 Johns. Rep. 205.*

Vide the opinion of STORR J. on the effect of awards in *Klein v. Catara, 2 Gall. Rep. 61.*

In Connecticut a submission to referees by rule of Court, may be revoked by either of the parties. *Bolton v. Halsey, 1 Root's Rep. 231.*

And where by the submission the award must be made to the next Court, and the

Chap. II. s. 2. award, whether made on a parol, or a written submission, may be given in evidence on a count in *assumpsit*, founded on the Awards.

Court adjourns with the cause, the power of the referees expires. *ibid.* Vide *Hall v. Hall*, 3 *Con. Rep.* 308.

A bond with a condition, containing a submission to an award of arbitrators, necessarily implies that the obligor will perform the award. *Bundy v. Sapin*, 1 *Root-Rep.* 411.

An award by rule of Court will not be set aside, unless corruption be shewn in the arbitrators. *Lewis v. Wildman*, 1 *Day's Rep.* 153. Vide *Bulkley v. Starr*, 2 *Do.* 533. *Allen v. Ranney*, 1 *Con. Rep.* 569. *Parker v. Avery*, *Kirb. Rep.* 335. So in *Maryland*, *Goldsmith's admrs. v. Tilly*, 1 *Har. & Johns. Rep.* 361.

So, in an action in a Justice's Court, the parties must be before the Court before the case can be referred. *Burroughs v. Genuing*, *ibid.* 103. *S. P. Prosser v. Richards*, *ibid.* 377.

Unless two of the three referees are to make report, it must be signed by all of them. *Reeves v. Goff*, *Penning. Rep.* 143. Sed contra in *New York*, vide *Battley v. Button*, 13 *Johns. Rep.* 187. *M'Inroy v. Benedict*, 11 *Do.* 402.

If the submission is not strictly pursued by the Clerk of the Court in making out the rule, the award will not be held valid. *Tetter v. Rapemnyder*, 1 *Dall. Rep.* 293.

There are four species of awards in *Pennsylvania*—1st. Those made by mutual consent in pursuance of arbitration bonds entered into out of Court.

2d. Those made in a cause depending in Court, upon consent of the parties, (which are awards at common law.)

3dly. Bonds of arbitration under the 9 & 10 *W. 3 c. 15.*

4thly. Those made in pursuance of the Act of Assembly of 1705, (1 *Sm L.* 50.) Per *M'KEAN C. J. Williams v. Craig*, 1 *Dall. Rep.* 314. *Herman v. Freeman*, 3 *Serg. & R. Rep.* 9.

To the above modes may be added 5thly. Awards under the Act of 21st *March*, 1806, (4 *Sm. L.* 226;) and 6thly. Awards under the Act of 20th *March*, 1810, (5 *Sm. L.* 131,) which authorises either party to enter a rule of reference, and regulates the proceedings upon such arbitration.

It seems the Legislature had in view under this Act only those cases in which the judgment is for a specific thing or sum of money. *Jones v. Stratton*, 4 *Serg. & R. Rep.* 76.

It has been the constant usage to refer actions of ejectment, under the Act of 1705. *Auston v. Snow's les.* 2 *Dall. Rep.* 157. *S. C.* 1 *Yeates' Rep.* 156. *S. P. Duer v. Boyd et al.* 1 *Serg. & R. Rep.* 203.

It is too late to annul a rule of reference, when the transaction has been investigated by the referees, and a report is agreed upon by them, unless there has been misconduct, or precipitancy, or a refusal to hear the testimony offered by either party. *M'KEAN C. J. Oxley et al. v. Olden*, 1 *Dall. Rep.* 430.

A rule of reference shall not be struck off after there has been a partial hearing of the case, notwithstanding that since the meeting of the referees, one of the parties is dead, and his representatives substituted. *Ruston v. Dunwoody*, 1 *Binn. Rep.* 42.

After an agreement to refer, a hearing before the referees, and an opinion intimated of the merits, the plaintiff cannot discontinue, without leave of Court, which would only be granted upon very cogent reasons. *Pollock v. Hall*, 4 *Dall. Rep.* 223. *S. C.* 3 *Yeates' Rep.* 42. *Ruston v. Dunwoody*, 1 *Binn. Rep.* 42.

The discovery of material evidence, which by using due diligence, the party might have discovered before, is not a sufficient reason to induce the Court to set aside an award. *Aubel v. Ealer*, 2 *Binn. Rep.* 582. n.

Unless in extraordinary cases the Court will not examine matters of fact, decided by referees; but when the point turns on the construction of a writing, or if the

original consideration,(1) or on an account stated.(2) But to enable the party in whose favour the award was made to avail him-
 Chap. II. s. 2. Awards.

principles on which the award is founded, are contrary to law, the Court will correct the error. *Large v. Passmore*, 5 Serg. & R. Rep. 51.

An award may be committed to the referees, without consent of the parties, for the purpose of correcting an informality. *Snyder's les. v. Hoffman*, 1 Binn. Rep. 48. *Eckarts ad. v. The exs. of Vanderen*, cited, 1 Binn. Rep. 45. *Thompson v. Warder*, 4 Yeates' Rep. 336. *Shaw v. Pearce*, 4 Binn. Rep. 485.

A report may be recommitted for the purpose of correcting an informality, though after judgment nisi, and exceptions filed, and against the consent of the adverse party. *Thompson v. Warder*, 4 Yeates' Rep. 336.

But where there has been a material error on the part of the referees, in the manner of conducting the business, the consent of both parties is essential to induce the Court to send it back. *Shaw v. Pearce*, 4 Binn. Rep. 485.

Quere, If the referees requested it. *ibid.*

If by an agreement in writing, to refer under the Act of 1703, it be stipulated that the award shall be under the hands and seals of the arbitrators, an award under their hands without their seals, is bad. *Rea v. Gibbons*, 7 Serg. & R. Rep. 304.

An award made by arbitrators, terminates the period of their power to act. *Fitzgerald v. Fitzgerald*, Hard. Rep. 227.

An award cannot be made of other matters beside those contained in the submission. *Sessions v. Barfield*, 2 Bay's Rep. 94.

When the award is void for uncertainty. *Jackson ex. d. Stanton v. De Long*, 9 Johns. Rep. 43.

THE SUBJECT OF THE REFERENCE.

A parent may submit to reference a trespass on his minor child, and the award will be good, although the damages be blended with other damages belonging wholly to the parent. *Beebe v. Trafford*, Kirb. Rep. 215.

The guardian of an infant may submit to arbitrators on behalf of his ward, and performance will be a bar to a suit by the infant when of age. *Weed v. Ellis*, 3 Caines' Rep. 254.

Where the submission is of all demands, which either party had against the other, the award is a conclusive bar to a suit for any demand existing at the time of the submission and award. *Wheeler v. Van Houten*, 12 Johns. Rep. 311.

A reference of a cause will not be granted if it appears that questions of law will arise. *De Hart v. Covenhoven*, 2 Johns. Cas. 402. *Low v. Hallet*, 3 Caines' Rep. 22. *S. C. Cole. & C. Cas. of Pract* 433. *Codwise et al. v. Backer*, *ibid.* 401. *Et vide Bedle et ux. v. Willett*, *ibid.* 148. *Lusher v. Walton*, *ibid.* 206. *S. C. 1 Cranes' Rep.* 150. *Williams v. Green*, *ibid.* 470. *Adams v. Boyles*, 2 Johns. Rep. 374. *Salisbury v. Scott*, 6 Do. 329.

Arbitrators cannot award costs where the law says they shall not give them. *Lewis v. England*, 4 Binn. Rep. 5. *Linderberger v. Unruh*, 1 Browne's Rep. 194.

In an action of trover, an award to restore specific articles, is not valid. *Buckley v. Durant*, 1 Dall. Rep. 129.

Where misrecital in the arbitration bond does not vitiate it. *Vide Dibles v. Best et al.* 11 Johns. Rep. 103.

An award of arbitrators appointed by the agreement of the parties, pending a con-

(1) *Kingston v. Philips*, Peak N. P. Cases, 327.

(2) *Keen v. Beshore*, 1 Esp. 194.

Chap. II. s. 2. self of it, he must not only prove the award, but in the case of Awards. a parol submission prove his own as well as the other party's

troversey in Chancery between them as co-parceners, is valid. *Fletcher v. Pollard*, 2 H. & Minsf. Rep. 544. Et vide *Brickhouse v. Hunter et al.* 4 Do. 363.

Under a general submission of all demands and controversies, the arbitrators may award as to real property. *Sellick et al. v. Addams*, 15 Johns. Rep. 197. *Munroe v. Allaire*, 2 Caines' Rep. 320.

THE PROCEEDINGS OF THE ARBITRATORS.

Both parties must have an opportunity of being heard, and that in the presence of each other; the parties must have a reasonable time to bring forward their witnesses, and they must give their testimony in the presence of the parties. *Hollingsworth v. Leiper*, 1 Dall. Rep. 161.

A report of referees was set aside, because they had ordered the parties to withdraw, and they examined the witnesses out of their hearing. *Hodgson v. Musgrove*, 1 Dall. Rep. 83.

Referees may inquire abroad into the price of work, or the truth of any matter of a public nature. *Chaplin v. Kirwan*, 1 Dall. Rep. 187. Vide *Passmore v. Pettit et al.* 4 Do. 271.

To entitle a party to demand of referees further time to procure testimony, he must shew why he has not been able to produce it. *Latimer et al. v. Ridge*, 1 Binn. Rep. 458. Et vide *Falconer v. Montgomery et al.* 4 Dall. Rep. 232. *Passmore v. Pettit et al. ibid.* 271.

If referees unreasonably refuse an adjournment, the report will be set aside. *Forbes v. Frary et al.* 2 Johns. Cas. 224.

The Court will not give referees instructions on a point of law, though they apply for them. *Geyer v. Smith*, 1 Dall. Rep. 347.

Under the Act of 1705, they cannot find the facts and refer the law to the Court. *Sutton v. Horn*, 7 Serg. & R. Rep. 238.

Where the report is merely informal, the Court may send it back to the referees to be corrected. *Snyder v. Hoffman*, 1 Binn. Rep. 43. Et vide *Les. of Lattimore v. Martin*, *Addis. Rep.* 11.

And when returned, the parties may be heard before them. *Bowers et al. v. Worrall*, 1 Browne's Rep. 212.

Referees are the only proper source of information to the Court, of the evidence they have received, and of the impressions made on their minds during the hearing of the case. *Howard v. Salter*, 1 Browne's Rep. 90.

Where the arbitrators found by mistake for the plaintiff in replevin, which error they afterwards certified; the Court set aside the first report, and an execution that had issued on it. *Newton v. Grambo, ibid.* 235.

A report of referees certifying that the parties had dispensed with their being sworn, is *prima facie* evidence of the fact. *Brink v. Bell*, 4 Yeates' Rep. 491.

In *New Jersey*, arbitrators may award, if the submission authorise it, that one party shall execute conveyances to the other; but such an award will not pass title to the land, and in case of non-compliance with the award, the remedy is on the bond. *Dum ex. d. Snedeker v. Allen*, Penn. Rep. 35.

THE AWARD.

A report of referees under the Stat. of 1786, c. 21, in *Massachusetts*, must be to the Court of Common Pleas, at the term holden next after it had been agreed upon;

assent to it, (1) and where it is in writing prove the execution Chap. II a. 2. Awards.

and if it be made to a Court which shall be in session at the time, or which shall be holden after the next succeeding term, the submission shall be *ipse facto* discharged; or if judgment shall be entered thereon, it may be reversed on writ of error. *Matt* supra. (1) Kingston v. Phelps, ubi v. Anthony, 5 Mass. Rep. 489. Southworth v. Bradford, *ibid.* 524. Bacon v. Ward, 10 Do. 141. Durell v. Merrill, 1 Do. 411. Whitney adm. v. Cook, 5 Do. 139.

If the submission be of all demands, and the report embrace only a part, the Court will not render judgment, but will recommit to the referees the subject matters referred to them. *Boardman v. England*, 6 Mass. Rep. 70.

In Virginia, an award can be set aside only for some illegality or injustice apparent on the face of it, or for misbehaviour in the arbitrators. *Sherman v. Beal*, 1 Wash. Rep. 14. *Pleasant v. Ross*, *ibid.* 156. *Kincaid v. Cunningham*, 2 Munf. Rep. 1. *Manlove v. Thrift*, 5 Do. 493. *Walker v. Long*, 6 Do. 76.

So in New York there must be misbehaviour or corrupt conduct in the arbitrators. *Perkins v. Wing*, 10 Johns. Rep. 143.

In an action on an award, if it appear from the narr. that the arbitrators decided on a plain mistake in law, it will be held bad on demurrer. *T. of Waterbury v. T. of Waterbury*, 1 Root's Rep. 212.

If an award of referees in the Court below be good on its face, the Court of Error will not inquire into the exceptions made to the proceedings of the referees as to matters of fact or of law. *Harker v. Elliott*, 7 Serg. & R. Rep. 224. Vide *Barlow v. Todd*, 3 Johns. Rep. 348.

The Court refused to interfere with an award of a barrister at law, to whom the cause had been referred, both as to the law and the fact, although the point at law decided by him, was at least doubtful. *Campbell v. Twenlow*, 1 Price's Ex. Rep. 81. *Rosevelt et al. v. Thurman*, 1 Johns. Ch. Rep. 290. Et vide *Swinford v. Brown*, 1 N. Gene's Rep. 5. *Richards v. Drinker*, 1 Huls. Rep. 307.

An award by arbitrators is conclusive in equity, unless corruption, partiality, or gross misconduct on the part of the arbitrators can be shewn, or unless they were mistaken in a plain point of law, which materially affected the interest of the parties. *Alwyn v. Perkins et al.* 3 Descs. Eq. Rep. 297. *Herrick v. Blair et al.* 1 Johns. Ch. Rep. 361. *Sheppard v. Merrill*, 2 Do. 376. *Underhill et al. v. Van Courtland et al.* 2 Do. 361, and in Ex. 17 Johns. Rep. 405. *Todd v. Binlow*, *ibid.* 551.

In New York the rule is settled, that an award, although the submission were made a rule of Court, cannot be impeached at common law, either in an action on the award, or collaterally, for a mistake either of law or of fact, and except in Chancery, it can only be avoided for corruption or partiality in the arbitrators. *Newlund v. Douglas*, 2 Johns. Rep. 62. *Barlow v. Todd*, 3 Do. 367. *Sheppard v. Watrous*, 3 Caines' Rep. 166. *Cranston v. Kenny's exs.* 9 Johns. Rep. 212. *Jackson ex. d. Van Alen & Ambler*, 14 Do. 96.

An award of arbitrators is conclusive, but a report of referees is like the verdict of a jury, subject to the revision and control of the Court. A cause referred, but not according to the Statute, is regarded as a submission to arbitrators. *Miller v. Vaughan*, 1 Johns. Rep. 315. *ibid.* 402.

In Connecticut the law appears the same. *Bulkeley v. Stewart*, 1 Day's Rep. 120. *Lewis v. Wildman*, *ibid.* 153.

For gross and palpable mistakes, an award at common law may be avoided in some of the States. *Morris et al. v. Ross*, 2 H & Munf. Rep. 408. *Clary v. Coor et al.* 1 Hayw. Rep. 225. *Sumpter v. Murrell*, 2 Bay's Rep. 250. *Copeland v. Anderson*, 2 Cull's Rep. 106. *Halcomb v. Flournoy*, 2 Do. 433. *Flournoy's exs. v. Halcomb*, 2 Munf. Rep. 34. *Sherman v. Beale*, 1 Wash. Rep. 11.

Five several actions between the same parties were referred, and but one report

Chap. II. s. 2. of the deed of reference, and that by all parties; for if it does Awards.

for the whole sum found due. The report was confirmed by the Court. *Brown v. Scott et al.* 1 *Dall. Rep.* 145. Vide *Hart et al. v. James*, *ibid.* 355. Sed vide *Greff v. Musser*, 3 *Serg. & R. Rep.* 264, where TILGHMAN C. J. says, that he had always understood, that referees could not consolidate, and that under the Act of 1810, they had no right to do it, without defendant's consent.

Arbitrators cannot make a supplementary report, at the instance of the plaintiff without defendant's knowledge. *Hart et al. v. James*, 1 *Dall. Rep.* 355.

An umpire chosen by the referees, ought to examine the witnesses and documents for himself, in the presence of the parties, without relying solely on the information or facts reported by them. *Falconer v. Montgomery et al.* 4 *Dall. Rep.* 232. *Passmore v. Pettit et al.* *ibid.* 271.

The same cause which will induce the Court to set aside a verdict, and grant a new trial, will govern in the case of awards; and therefore if it appear, that there has been manifest injustice, or a plain and clear mistake, either in law or in fact, the report will be set aside. *Williams v. Craig*. 1 *Dall. Rep.* 315. *Wickoff et al. v. Coxe*, 1 *Yeates' Rep.* 353. *Warder v. Parker et al.* 2 *Do.* 513. *Williams v. Paschall*, 3 *Do.* 569. *Romans v. Robertson*, *ibid.* 584. *Gross v. Zorger*, *ibid.* 521. *Bond v. Olden*, 4 *Do.* 243. *Govett v. Reed*, *ibid.* 456. *Bell v. McCall*, 1 *Browne's Rep.* 128. *Lower Dub. School v. Paul*, 1 *Binn. Rep.* 59. *Jubel v. Ealer*, 2 *Binn. Rep.* 582; in note, *S. C.* 1 *Browne's Rep.* 105, in note.

In Connecticut, the defendant cannot take advantage of any defect in an award, which respects others; if good as far as concerns him, it is sufficient. *Nettleton v. Buckingham*, 1 *Root. Rep.* 149.

An award must be final and certain. *Carter v. Ross*, 2 *Root. Rep.* 507. Vide *Grier et al. v. Grier*, 1 *Dall. Rep.* 174. *Les. of Lattimore v. Martin*, *Addis. Rep.* 11. *Gonzales v. Deavens*, 2 *Yeates' Rep.* 539. *Young v. Reuben*, 1 *Dall. Rep.* 119. *Purdy v. Delavan*, 1 *Caines' Rep.* 304. *Solomons v. McKinty*, 13 *Johns. Rep.* 27.

An award will not be set aside on slight grounds. *Combs v. Wyckoff*, *Col. & Caines' Cas. in Pract.* 202. Vide *Hawkins v. Bradford*, *ibid.* 216.

But it will, unless it decides the whole matter submitted, and so if it exceeds the subject submitted, unless the excess can be separated. *Huff v. Parker*, cited 4 *Dall. Rep.* 285. 3 *Yeates' Rep.* 567. Vide *Martin et al. v. Williams*, 13 *Johns. Rep.* 264.

An award that plaintiff shall pay the cost of suit, and no more, is equivalent to finding no cause of action. *Traquair v. Redinger*, 4 *Yeates' Rep.* 282. Vide *McDermott v. U. S. Ins. Co.* 3 *Serg. & R. Rep.* 604. *Macon v. Crump*, 1 *Call's Rep.* 575.

Referees cannot delegate their authority to others, or provide for the settlement of a future dispute by another tribunal, unless they have power to do so by agreement. *Levezey v. Gorgas*, 4 *Dall. Rep.* 71. Vide *Kington v. Kincaid*, *C. C. April, 1806, M. S. Rep.*

It is not a sufficient objection to an award, that the remedy for each party is not the same. *Kunckle v. Kunckle*, 1 *Dall. Rep.* 364. Vide *Stuart v. Ralston*, *ibid.* 365.

A report finding for plaintiff in ejectment is good, though neither damages nor costs are awarded. *Austin v. Snow's les.* 2 *Dall. Rep.* 157. 1 *Yeates' Rep.* 156.

Under a general submission of all controversies, the arbitrators may award as to real property. *Selick et al. v. Adams*. 15 *Johns. Rep.* 197. Et vide *Munroe v. Allaire*, 2 *Caines' Rep.* 320.

An award of costs is good, though the principal sum if found by a jury, would not carry costs. *McLaughlin v. Scot*, 1 *Binn. Rep.* 61. Vide *Strang v. Ferguson*, 14 *Johns. Rep.* 161.

not appear to have been so executed, there was no consideration Chap. II. s. 2. Awards.

Part of an award may be confirmed, and part set aside. *Woglam v. Burnes*, 1 Binn. Rep. 109. *Galloway v. Webb*, Hard. Rep. 318. *Lyle et al. v. Rodgers*, 5 Wheat. Rep. 394.

An award ought not to be set aside for a difference of opinion; but for a palpable mistake in the arbitrators, it may. *Morris v. Ross*, 2 H. & Munf. Rep. 408.

Awards are to be construed according to their intention appearing from the words of the whole. *Grier et al. v. Grier*, 1 Dall. Rep. 174. *Imes v. Miller*, *ibid.* 188. *Kunkle v. Kunkle*, *ibid.* 365. *Gonzales v. Deavens*, 2 Yeates' Rep. 539. Vide *Burrows v. Patterson*, Tayl. Rep. 37. *Cleary v. Coor et al.* 1 Hayw. Rep. 225. *Blackledge v. Simpson*, 2 Do. 30. *Galloway v. Webb*, Hard. Rep. 318.

An award to pay the executors of A. is sufficiently certain. *Grier et al. v. Grier*, 1 Dall. Rep. 173. Vide *Bryant v. Milner*, Rep. in Ct. of Conf. 313.

If two defendants enter a rule of arbitration, and an award be given against one only, the construction of law is, that it is in favour of the other. *Leniz v. Streh*, 6 Serg. & R. Rep. 34.

When a report has been returned to the same referees, both parties have a right to be heard before them. *Bowers et al. v. Worrell*, 1 Browne's Rep. 212.

In cases of mistake by the arbitrators, vide *Newland v. Douglass*, 2 Johns. Rep. 62.

In cases of uncertainty of awards, vide *Murray's adm. v. Bruner*, 6 Serg. & R. Rep. 276. *Schuyler v. Van Der Veer*, 2 Caines' Rep. 235. *Jackson ex. d. Stanton v. De Long*, 9 Johns. Rep. 43.

Under a plea of *no award*, the defendant may shew that the arbitrators awarded on a matter not submitted to them. *Macomb et al. v. Wilber*, 16 Johns. Rep. 227.

An award fixing the boundaries of land, will not be received in an action of *trespass quare clausum fregit*. *Drane v. Hodges*, 1 Har. & M'Hen. Rep. 262. Vide *West v. Stiger*, *ibid.* 247.

Where there is a proviso in the bond of submission that the award shall be under the hands and seals of the arbitrators, an award in writing, but not under seal, is bad. *Stanton v. Henry*, 11 Johns. Rep. 133. *Rea v. Gibbons*, 7 Serg. & R. Rep. 304.

THE REMEDY ON THE AWARD.

A bill in Equity for the specific performance of an award, is common and proper. *Smallwood v. Mercer et al.* 1 Wash. Rep. 295. Vide *Baker v. Glass*, 6 Munf. Rep. 212.

In an action of debt on an award, the plaintiff need not set forth more than what is in his favour, and sufficient to support his demand. He need not shew the award on both sides. *M'Kinstry v. Solomons*, 2 Johns. Rep. 57. *Duplee v. Best et al.* 11 Do. 103.

OF THE REMEDY ON THE AWARD, IN PENNSYLVANIA, UNDER THE ACT OF 1705.

If one of the parties be ordered by the award to do a specific act, he may be compelled by attachment to do it. *Kunkle v. Kunkle*, 1 Dall. Rep. 364. Vide *Blackburn et al. v. Markle*, 6 Binn. Rep. 174.

A judgment on report of referees, with stay of execution until a deed for land should be filed, and until the Court should adjudge the same to convey a good title in fee simple to the plaintiffs, was held good, on error. *Barde et al. v. Wilton*.

Chap. II. s. 2. for the submission of the defendant. (1)(A) The award must have the stamp imposed by the Legislature, but when two arbitrators are at liberty to appoint an umpire, their appointment requires no stamp. (2)

Having, when speaking of the different Courts individually, but slightly mentioned the cases in which judgments or sentences of those Courts would be evidence, I shall now proceed to collect, into one view, the general rules which are applicable to all.

It was before observed that the judgment, sentence, or decree, of the same Court, or one of *concurrent* jurisdiction, *directly* upon the point, may be pleaded as a bar, or given in evidence as *conclusive* between the same parties *upon the same matter* directly in question: and in like manner, the judgment of a Court of *exclusive* jurisdiction, *directly* upon the point, is *conclusive* upon

3 *Yeates' Rep.* 149. *S. P. Nicholas v. Wolfersperger*, 5 *Serg. & R. Rep.* 167. Under a compulsory arbitration.

If a report of referees finds a sum of money due from the plaintiff to the defendant, the defendant cannot enter up judgment and issue execution. He must proceed by *scire facias*, or probably by attachment. *Blackburn et al. v. Markle*, 6 *Binn. Rep.* 174.

Awards made under the Act of 1705, in *Pennsylvania*, and confirmed by the Court, have the same effect as the verdict of a jury, and no more. *Williams v. Craig*, 1 *Dall. Rep.* 314. *Duer v. Boyd et al.* 1 *Serg. & R. Rep.* 203.

An award of referees, in ejectment, under the Act of 1705, where the submission is of all matters in controversy in the case, is not conclusive of title. *Duer v. Boyd et al.* 1 *Serg. & R. Rep.* 203. *Les. of Taggart v. Bickley*, cited, 1 *Serg. & R. Rep.* 209, 213.

So an award at common law, in an action of ejectment, where the title was submitted to the arbitrators, was determined to be conclusive of the title between the parties. *Calhoun's les. v. Dunning*, 4 *Dall. Rep.* 120. See vide *Dixon's les. v. Moorhead*, *Addis. Rep.* 251. *Duer v. Boyd et al.* 1 *Serg. & R. Rep.* 203.

Where an award on the face of it is final, nothing *dehors* can be pleaded or given in evidence against it. *Barlow v. Todd*, 3 *Johns. Rep.* 367.

An award under a rule of Court, is a bar to any antecedent claims in *Connecticut*. *Park v. Halsey*, 2 *Root's Rep.* 100.

Money voluntarily paid in compliance with an award of arbitrators, cannot be recovered back in an action of *indebitatus assumpsit*. *Buckley v. Stewart*, 1 *Day's Rep.* 130.

An award which is final and conclusive, will be a bar to a subsequent suit, for the same cause of action. *Purdy v. Delavan*, 1 *Caines' Rep.* 304. Vide *Shepard v. Rogers*, 15 *Johns. Rep.* 497.

A submission to arbitrators is a good consideration for a note. *Shepherd v. Watrous*, 3 *Caines' Rep.* 166.

If in an action for words, the matter be left to arbitrators, it cannot, in an action to recover the sum they awarded, be shewn that they were not actionable. *ibid.*—*Am. Ed.*

(A) An award made *pendente lite*, cannot be given in evidence upon the plea of *non assumpsit*. *Harrison v. Brock*, 1 *Munf. Rep.* 22.—*Am. Ed.*

the same matter between the same parties coming *incidentally* in question in another Court for a different purpose.⁽¹⁾ But neither the judgment of a concurrent or exclusive jurisdiction, is evidence of any matter which came *collaterally* in question, though within their jurisdiction; nor of any matter *incidentally cognizable*; nor of any matter to be *inferred by argument* from the judgment.⁽ⁱ⁾

Chap. II. s. 2.
General Observations as to the effect of Sentences.

(1) Vide 11 St. Tr. 261.

Judgments which are merely on questions of property between party and party are, as was elsewhere observed, evidence only between the parties, or those claiming under them; but those *in rem*, or in the Ecclesiastical Courts, on matrimonial causes, are evidence against third persons.^(k) In these cases, nevertheless, a stranger is always at liberty to shew that such judgment, sentence, or decree, was obtained by fraud and collusion between the parties to it; for fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice, and though it is not permitted to shew that a Court was *mistaken*, it may be shewn that it was *misled*; but the parties to them are not permitted to avail themselves of their own fraud.^(l)

Vide 4 Co. 29, a.
Hervey's case, note (r).
Vide 11 St. Tr. 262.
2 Ves. 246.

(i) By the common law, the judgment of a foreign Court is *conclusive* when the same matter comes again incidentally in question. *Croudson v. Leonard*, 4 Cranch Rep. 442.

The judgment or decree of a competent Court upon a matter within its jurisdiction, is *conclusive* of the rights of the parties, on the same point, in any other Court of concurrent jurisdiction. *Starkie v. Woodward*, 1 *New & Mc Cord's Rep.* 329, n.

In *New York*, where an admeasurement of dower has been made by the Surrogate, pursuant to the Statute, (1 *N. R. L.* p. 60,) and there has been no appeal or review of the proceedings, in an action of ejectment brought by the widow, the admeasurement is *conclusive*, until reversed, as to the part she is entitled to receive. *Jackson ex d. Miller v. Elison*, 17 *Johns. Rep.* 123.—AM. ED.

(k) A sentence of condemnation by a Court of competent jurisdiction, proceeding *in rem*, is, in an action of trespass for the property seized, *conclusive evidence* against the title of the plaintiff. *Gelston et al. v. Hoyt*, 3 *Wheat. Rep.* 315. Et vide *Hoyt v. Gelston et al.* 13 *Johns. Rep.* 141. And in error, *ibid.* 561.

A judgment or decree of a Court of competent jurisdiction, is *conclusive*, wherever the same matter is again brought in controversy. *Hopkins v. Lee*, 6 *Wheat. Rep.* 113. But this rule does not apply where the points come *collaterally* in issue. *ibid.* Et vide *Simpson v. Hart*, 1 *Johns. Ch. Rep.* 91.—AM. ED.

(l) In an action for the price of rum sold, the defence was, that it was adulterated. To prove the adulteration, the record of condemnation was offered in evidence, and to connect the plaintiff with it, a record was offered of proceedings by the Crown for penalties in which the defendant was convicted. GRANA, C. J. held the record of condemnation, being *in rem*, to be admissible, but refused to admit the record of conviction for penalties, alleging, that as it was *in personam*, it could not be evidence in a case where the parties were different. *Hart et al. v. M'Naman*, 4 *Price's Exc. Rep.* 154, note.

Chap. II. s. 2.
General Ob-
servations as
the effect of
Sentences.

Conformably to these general principles, the following deci-
sions have taken place:

If a question of legitimacy arise *incidentally* upon a claim to a real estate, a sentence of *nullity*, or one in *affirmance* of a marriage in the Ecclesiastical Court, is *conclusive* evidence against the parties, or those who have acquiesced in the sentence, and all claiming under them; as where *A.* and *B.* being married, *C.* libelled against the wife on a pre-contract, which the Spiritual Court enforced, and *B.* and *C.* afterwards married, living the first husband, and had a son, who brought an ejectment, and made out his title as heir to his grandfather; it was held, that the sentence was *conclusive* evidence of his legitimacy: (1) and in like manner, where two persons had married within the age of consent, and the Ecclesiastical Court pronounced a sentence of divorce on that ground, this sentence was held conclusive of that fact, as against the children of the marriage, and destroyed their legitimacy. (2) So a sentence in a cause of *jactitation*, has been held *conclusive* evidence against the issue in an ejectment. (3) And where an action has been brought upon a contract of marriage, or for adultery with the plaintiff's wife, a sentence in the Ecclesiastical Court against the contract in the one case, (4) * or declaring the supposed wife free in a *jactitation* cause in the other, (5) is *conclusive* evidence.

So a sentence of expulsion unappealed from, given in evidence on an ejectment or indictment for assaulting a fellow-commoner of Queen's College, *Cambridge*, by turning him out of the gardens, is *conclusive* for the defendant, and consequently evidence on the part of the lessor of the plaintiff, or prosecutor to prove the irregularity of the sentence, is inadmissible. (6) And a conviction before a magistrate, having competent jurisdiction, is till quashed or reversed, *conclusive* evidence in favour of the justice in an action against him for false imprisonment. (7)

In all these cases the parties to the suit were parties to the sentence or conviction, or had acquiesced under it, or claimed under those who stood in that situation; and for the same reason, in the case of the *Duchess of Kingston*, Lord ARSLEY considered the sentence of the Ecclesiastical Court, declaring her

A judgment or decree obtained on false and fraudulent suggestions, is void. *Borden v. Fitch*, 15 *Johns. Rep.* 121.—AM. ED.

* This case was before the Statute 26 *Geo. 2*, c. 33, by the 13th section of which Statute, it is enacted, that no suit shall be had in the Ecclesiastical Court, to compel a celebration of marriage, by reason of any contract.

(1) *Bunting's case*, 4 *Co.* 29.

(2) *Kenn's case*, 7 *Co.* 41.

(3) *Jones v. Bow*, *Carth.* 225.

(4) *Dacosta v. Villa Real*, 3 *Stra.* 961.

(5) *Clewes v. Bathurst*, 2 *Stra.* 960.

(6) *Rex v. Grunden*, *Cowp.* 315.
Phillips v. Bury, 1 *Lord Raym.* 5.

(7) *Strickland v. Ward*, *Wincheater Sum. Assizes* 1757, *ser.* *Yates, J.* 7 *T. Rep.* 633, *note.*

free from *Harvey*, to be so conclusive against the heir at law, Chap. II. s. 2. and next of kin of the Duke, as to be pleadable in bar to a bill brought by them to set aside his will on the ground of fraud in the Duchess, in imposing herself upon him as a single woman, (1) but when the same sentence was offered as *conclusive* evidence against the charge of bigamy, the House of Lords held that it was not so; first, because the King was no party to the first suit, *nor could become so*; and secondly, because the Ecclesiastical Court had no judicial cognisance of crimes: (2) and upon the same principle it was held by Lord ELLENBOROUGH, that the probate of a will was no evidence in answer to an indictment for forging the will, (3) though the contrary had been previously held. (4) In like manner in *Prudham v. Phillips*, (cited *Ambl.* 762, and several times in the *Duchess of Kingston's* case,) it was held, that the sentence in the Ecclesiastical Court, annulling a marriage, might be avoided by third persons on account of fraud and collusion in the parties, though the parties themselves were estopped from shewing their own fraud. So, though a judgment of ouster against one corporator is admissible against another deriving title through him, to prove that the person ousted had no title; (5) and the conviction of a principal felon may be received, to prove the felony committed, against the person indicted as an accomplice, yet they are neither of them conclusive evidence of these facts, but may be controverted by the party against whom they are so read. (6) (m)

But in an action against Mr. *Harvey*, by a creditor of his supposed wife (they living separate,) he shewed a sentence in a cause of jactitation declaring against the marriage, and that not being impeached by the creditor, was considered as conclusive evidence against the marriage, though it was afterwards reversed on appeal. (7)

In cases where every person has an opportunity of coming into Court, and being made a party to the suit, as in all proceedings *in rem*, and probates of wills, the sentence or grant of probate binds *all persons*, and none can be permitted to impeach the

(m) The decision of a Court of peculiar and exclusive jurisdiction, is completely binding upon the judgment of every other Court, where the same subject matter comes incidentally in controversy. *Gelston et al. v. Hoyt*, 3 *Wheat Rep.* 315. Vide 1 *Johns. Ch. Rep.* 543. 13 *Johns. Rep.* 561. *The Mary*, 9 *Cranch's Rep.* 142.

To render the sentence of a District Court of the *U. States*, sitting as a Court of Admiralty, and deciding the question of prize, conclusive on the same point arising incidentally in the State Court, such District Court must have had jurisdiction of the subject matter; and whether it had or not, the State Courts are competent to examine and decide. *Stocum v. Wheeler et al.* 1 *Con. Rep.* 429.—AM. ED.

Judgments of exclusive Jurisdiction.

(1) *Ambl.* 756.

(2) Vide 11 St. Tr. 261.

(3) *Rex v. Gibson, Lancaster Sum. Assizes, 1802.* 2 Evans's Pothier, 356.

(4) *Rex v. Vincent*, 1 *Str.* 481.

(5) *Rex v. Grimes*, 5 *Burr.* 2598.

(6) Vide Foster Cr. L. 364

(7) Vide 11 St. Tr. 235.

Chap. II. s. 2. proceedings in another suit, when it comes incidentally in question. (1)

(1) Vide 11 St. Tr. 218. 222

(2) Rex v. Holt, 5 T. Rep. 436.

(3) Bul N. P. 226.

(4) Rex v. Withers, cited 5 T. Rep. 442.

(5) Rex v. Sutton, 4 M. & S. 532.

(6) Bul. N. P. 249.

(7) Rex v. Aikins, Leach. Cas. 435.

(8) Doe d. Cockson v. Thorp, 5 M. & S. 72

(9) D'Israeli v. Jowett, 1 Esp. Cas. 427.

When any *public measure* has been adopted by the government of this country, it is usual to announce such measure to the public by means of a *gazette*, which is published under the sanction and control of government; and of any *Act of State* so announced, this *gazette* is of itself sufficient evidence; (2) the *King's proclamations, addresses* from the people to the Crown, and the like, may be proved in this manner without a production of the proclamation or address itself, for these being matters of public notoriety, communicated to the public in a known prescribed form, the law pays such attention to the established rules of office, as not to call for higher evidence than that to which all mankind look for information on the subject. For the same reason, *proclamations*, (3) and the *articles of war*, (4) as printed by the King's printer, are received as sufficient evidence of such instruments having been duly issued; and where a proclamation recited, that it had been represented that outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, such proclamation was admitted as evidence to prove an introductory averment in an information for a libel that divers acts of outrage had been committed in those parts; and the recital in an Act of Parliament of such outrages, and making provision against them, was held to be admissible for the same purpose. (5) (n) The register of the navy office, (6) with proof of the method there used, to return all persons dead with the mark *Dd.* is sufficient evidence of death; as is the daily book (7) of a public prison, to prove the time of a prisoner's discharge; or an entry in the books kept by the quarter sessions, to prove not only the prisoner's discharge, but that he was actually a prisoner on the day when he appeared to be so by the entry. (8) So the log-book of a man of war has been received, to prove when a ship became part of her convoy. (9) (o) And entries in the books of the clerk of the peace of deputations formerly granted to gamekeepers, as evi-

(n) Articles of agreement between the proprietaries of *Pennsylvania* and *Maryland*, ascertaining the boundaries of the two provinces, enrolled in the Court of Chancery in *England*, but not proved or recorded in *Pennsylvania*, may be considered in the light of a State paper, and admitted in evidence. *Ross's les. v. Cuthshall*, 1 Binn. Rep. 399.—AM. ED.

(o) A log book is evidence under the Act of Congress. *Herron v. Schooner Peggy*, Bee's Rep. 58.

It is evidence to prove the time of *stay, sailing, and departure*. *Smallwood v. Mitchell*, 2 Hayw. Rep. 146.—AM. ED.

dence of a right of manor in the person granting such deputations.⁽¹⁾

Chap. II. s. 2.
Acts of State.

But though the book of a public prison is sufficient to prove the time of a commitment or a discharge, yet the cause of imprisonment must be proved by other evidence; and therefore, in a question of bankruptcy, where the supposed bankrupt had been two months in prison,⁽²⁾ it was held that, to prove the fact of his imprisonment having been *for debt*, the original *committitur* should have been produced; and though an entry made at the Custom-house, of the transfer of a ship, would be good evidence against the person making the affidavit of his property in the ship;⁽³⁾ yet it is not even *prima facie* evidence against a stranger named in it, and who gave no authority for the insertion of his name,⁽⁴⁾ nor for the person making it, without proof of his possession;⁽⁵⁾ for in this case, it should be observed that the officer making the entry only records the fact stated to him by others.^(q)

(1) Hunt v. Andrews, 3 B. & Ald. 341.

(2) Salte v. Thomas, 3 Bos. & Pul. 188.

(3) Cooper v. Smith, 4 Taunt. 302. Frazer v. Hopkins, 2 Taunt. 5.

(4) Tiockler v. Walpole, 14 East. 226.

(5) Lane v. Anderson, 4 Taunt. 642.

(p) *Quere*, Whether the register of a ship is conclusive evidence of title. *Clark v. Richards*, 1 Cyn. Rep. 54. In *Starr et al. v. Knox*, 2 Do. 215, it was held not conclusive.

Quere, Whether it be *prima facie* evidence, that she belongs to a citizen. *De-derer v. Del. Ins. Co. C. C. Penn.* April, 1807, *M. S. Rep.*

The register of a ship, being an affidavit made by one of the defendants (who was returned *non est inventus*), stating that the ship belonged jointly to him and the other persons, copied from the books of the naval officer, and certified under his seal of office, was allowed in evidence against the defendants. *Woods v. Courter et al.* 1 Dall. Rep. 141.—AM. ED.

(q) Under the 21st sect. of the Impost Act of March 2d, 1799, (*Ing. Dig.* 188,) which enjoins on the Collector "to record in books, to be kept for the purpose, all manifests," a copy of the manifest of a vessel, certified under the hands and seals of the custom house officers of B. and proved by a witness to have been compared with the record, was ruled admissible on an indictment for destroying a vessel at sea. *U. States v. Johns*. 4 Dall. Rep. 413.

The certificate of the Governor of a West India island, stating that the defendant had applied for leave to take away his cargo, to save the penalty of an embargo bond, and which permission he had refused, was allowed in evidence. *U. States v. Mitchell et al.* C. C. Penn. Oct. 1811, *M. S. Rep.*

But the certificate of the Collector General of the customs of the Havana, under his seal of office, stating that a cargo insured was decreed by the Intendant to be sold, is not evidence as it relates to the transactions of another tribunal, which are presumed to be in writing. *Wood v. Pleasants*, *ibid.* April, 1813, *M. S. Rep.*

The certificate of an American consul at a foreign port, where the vessel was forced in by stress of weather, that the ship's papers were lodged with him, is evidence of that fact, but no other. *U. States v. Mitchell et al.* *supra*.

The certificate of the Secretary of State, is good evidence to prove that a foreign minister was received by the government. *U. States v. Little*, C. C. Penn. Oct. 1808, *M. S. Rep.*

A certificate by the Secretary of the Commonwealth, stating that by a certificate of the Receiver General, it appeared that the purchase money had been paid on the

Chap. II. s. 2. It is agreed, that to prove a *particular custom*, a printed history is no evidence; and therefore, when *Cambden's Britannia*

Stainer v. Burgesses of Droitwich, Salk. 281. 12 Mod. 85. S. C.

was offered in evidence on an issue, whether, by the custom of *Droitwich*, salt pits might be sunk in any part of the town, or in a certain place only, it was rejected; and *Dugdales's Monasticon* was also refused on a question, whether an abbey was inferior or otherwise. But it was said, that in the case of *Stainer v. Droitwich*, that a general history was sufficient evidence of a matter relating to the kingdom in general; (r) and the case of *St. Catherines Hospital* was cited, where a chronicle was said to have been allowed as evidence to prove a particular point of history in the time of *Edward III.* From the report of that case, it appears, that the question being whether the patronage of the hospital was in the Queen dowager or the Queen consort, a record in *Edward the Third's* time was produced, wherein *Isabel*, the Queen of *Edward II.* though living, was stiled *nuper Regina*, and the right determined to be in the Queen consort. *Speed's Chronicles* were produced, "to shew that at that time Queen *Isabel* was under great calamity and oppression, and that what "was then determined against her was not so much from the "right of the thing as the iniquity of the times, so that (as is observed in the report) that authority was much invalidated from "the circumstances of the time." The same point was again made in a subsequent case, and the book being produced, as is said in the report, to prove the death of Queen *Isabel*, *Dolben* said, the evidence was received by consent; but the Chief Justice (*PEMBERTON*) said, he knew not what better proof they could have: and *Wallop* said, that in the *Lord Bridgewater's* case, the House of Lords admitted it as good evidence. On this case, as reported by *Ventris*, we may observe that it was admitted merely as evidence of the general reputation of the time,

Lord Browneker v. Sir R. Atkins, Skin. 14.

plaintiff's warrant, and that it was the *usual practice* not to affix the seal of the office until it appeared by a certificate of the Receiver General that the money has been paid, is not evidence to shew at what time the seal was affixed to the plaintiff's warrant. *Les. of Brown v Galloway*, 1 *Peters' Rep.* 291.

Quere, Whether a certificate by the *accountant* of the Navy Department, under the seal of the Department, is evidence. *Murray v. Wilson*, 1 *Binn. Rep.* 531.—AM. ED.

(r) Transactions and objects which necessarily connect themselves with, and form a part of the general history and geography of the country, ought to be taken notice of, without particular evidence proving their notoriety. *Hart v. Bodley, &c. Hardin's Rep.* 98.

No collection of history, compiled by an individual, can be admitted in evidence; *aliter* if it be shewn to be an official document. *Harward v. Billington*, 4 *Price's Ex. Rep.* 427.—AM. ED.

that the mother of the reigning monarch was unkindly treated by him, and for the purpose of shewing the ground on which a judgment, evidently wrong, proceeded. Chap. II. s. 2.
History.

The fact thus proved was matter of public notoriety, which, if it had happened just before the time, the Judges in a case within their province, or a jury, if it was submitted to them as a question of fact, would take judicial notice of. Thus, Mr. J. FORSTER says, if a man be indicted for treason, in adhering to the King's enemies, the fact, whether war or no, is triable by the jury, and the public notoriety is sufficient evidence of that fact. Disc. on Treas.
son, c. 3, s. 12.

But another case is also mentioned in the reports of *Stainer v. Droitwich*, (both in *Salk.* and *12 Mod.*) which, if correctly stated, would tend to admit such evidence to fix the particular dates of transactions not very remote from the time of trial. It is cited in *12 Mod.* by the name of *Neale v. Jay*, and in *Salk.* by that of *Neale v. Fry*: in the latter book it is stated to have passed about twelve years antecedent to that time, and is thus cited: "A deed was produced, said to be made 1 *Philip & Mary*, wherein all the titles were given to *Philip*, which he used after the surrender of *Charles* the Fifth. Now though *Charles* had then surrendered, yet *Philip* did not take the titles upon him till that surrender had been received by the council of *Spain*, which was six months after, so that the deed must needs have been forged: and, to prove the time of receiving that surrender, chronicles were produced and admitted as evidence." Mr. J. BULLER has implicitly followed the report in *12 Mod.* citing this case from it by the name of *Neale v. Fry*, and I, in the first edition of this work, was led into the same error by *Salk.*; but upon looking farther into this authority, it is plain that the person who cited the case did not correctly state it. From the date and name of one of the parties, there can be no doubt but that the case of *Mossam v. Ivy*, 7 *St. Tr.* 571, was the case alluded to. That case happened in Trin. Term, 1684; it was an ejectment on the demise of *Neale*, and Lady *Ivy* the defendant, setting up two deeds, dated 13th *November*, and 22d of *December*, 3 *Philip & Mary*, (not 1 *Philip & Mary*, as stated in *Salk.*) the plaintiff showed, by the titles to several Acts of Parliament, and other records of this kingdom, that even then *Philip* had not assumed the titles which were given to him in the deeds; but it does not appear from the report in the *State Trials*, which, like most others in that collection, contains *verbatim* every thing which passed, that the plaintiff even offered to read any chronicles in evidence. The defendant, on the contrary, did offer such evidence to show when *Charles* resigned, and it was rejected by the Court, the Chief Bul. N. P. 248.
Ivy, 7 St. Tr. 571.

Chap. II. s. 2. **Justice (JEFFERYS)** saying, "Is a printed history, written by I know not who, evidence in a Court of Law?" The attention to which such history is entitled, even if it be at all admissible, is certainly not much, and no stronger instance can be adduced of the danger of relying on it, than this of the time when *Philip* first assumed his title, for by the laborious industry of Dr. *Robertson*, we are acquainted with the extraordinary fact, that though the date of the instrument, by which *Charles* resigned his Imperial Crown to his son and successor, is agreed to be the 25th of *October*, 1555, yet the day, and even the month when he actually invested *Philip* with the government, though a public and notorious act, is disputed by the best and most accurate historians of the time; and that the precise time when he resigned his *Spanish* dominions is no less a subject of controversy amongst them.*

Surveys, taken on public occasions, are evidence to ascertain the rights of individuals not named in them: thus doomsday-book, which was a survey of the King's lands, made in the time of *William* the Conqueror, is the only evidence to prove whether a manor is held in ancient demesne, that is, whether it was part of the soccage tenure in the hands of *Edward* the Confessor, or not; and so high is the credit of this book, that the inspection is made by the Court. So if a question arise as to the extent of the ports, there lies in the Exchequer a particular survey which ascertains it; and in many instances, where a commission has been confined to a particular place, it has been received as admissible evidence; as where a commission issued out of the Exchequer in the reign of Queen *Elizabeth*, directing commissioners to inquire whether a prior was seised of certain lands, as parcel of a manor, and whether, after the dissolution of the priories, the Crown was seised, with directions to summon a jury; and inquisition taken under it, and the depositions of the witnesses were held to be admissible, though not conclusive evidence of the fact. In like manner an inquisition taken in the time of the Commonwealth, by order of the then existing government, to ascertain the extent of the lands belonging to the prebend of the moor of *St. Paul's*, was received against a person claiming under them as evidence of the extent of their rights; and that taken under the direction of the House of Commons, in the year 1730, as conclusive evidence of the tenure

Robertson's
Charles 5.
Bk. 11.

Hob. 188.

Gilb. Law
Ev. 78.

Tooker v.
Duke of
Beaufort,
1 Burr. 146.

Doe dem.
Powell v.
Harcourt, K.B.
Sittings after
East. Term.
39 Geo. 3.
Append.

* See also *Hume's Hist.* vol. iii. 234, and note (I) at the end of that vol. for instances of inaccuracy in our own historians.

and fees of the different offices noticed in it.(1) So an ecclesiastical survey is not only admissible, but strong evidence to prove an endowment; and aided by the perception of small tithes (although not of all) will give the vicar a right to tithes of articles of modern introduction against the lessee of the rector.(2) And even when the commission has been lost, the survey taken under it has been allowed as evidence.(3) These, and many other cases of a similar nature, have proceeded on the ground that the Act being done under the direction of the public, for the purpose of determining a public question, is entitled to a degree of credit which no act of an individual is.(s)

Chap. II. s. 2.
Surveys and
Inquisitions.

(1) *Green v. Hewitt, Peake N. P. 182.*

(2) *Cunliffe v. Taylor, Price, 329.*

(3) *Vicar of Killingtom v. Tr. Col. 1 Wils. 370.*

(s) A plot of a survey in the hand writing of the deputy surveyor, dated in 1790, not returned into office, but found among his papers after his death, was allowed to be given in evidence against a regular warrant and survey posterior in time, settlement and possession having followed the first survey, and the Land Office having been shut between 1718 and 1792. *Les. of Fothergill v. Stover, 1 Dall. Rep. 7.*

A survey adopted by the Land Office, though not made by the regular officer, may be read in evidence. *Les. of Shields v. Buchanan et al. 2 Yeates' Rep. 219.*

The copy of a warrant of survey, under the Surveyor General's hand, and containing his directions to the deputy to make the survey, has always been admitted in *Pennsylvania*. *Les. of Hewes v. M'Dowell, 1 Dall. Rep. 5.*

The office copy of a survey, certified by the deputy surveyor general without seal, (none being established by law,) and the original not in the office, was allowed in evidence. *Master's les. v. State, 2 Dall. Rep. 31.*

A map of *Germanstown*, shewing the lines of lots and out lands, made about 1743, is not proper evidence for the jury. *Biddle's les. v. Shippen, 1 Dall. Rep. 19.*

The list of first purchasers was admitted to prove a grant by *William Penn*, the deed of which was lost. *Hurst v. Dippe, 1 Dall. Rep. 20.*

An abstract from a book in the Surveyor General's office, containing a list of returns by deputy surveyors, being a charge against a deputy surveyor for the land in question, is evidence that the survey was returned. *Les. of Penn v. Ingham, C. C. Penn. Oct. 1811, M. S.*

A memorandum made by a deputy surveyor, at the foot of a survey, of a matter not within the line of his duty, is not admissible, especially if the deputy surveyor has been examined in person. *Salmon et al v. Rance, 3 Serg. & R. Rep. 315.*

An extract from the Surveyor General's books of instructions to a deputy surveyor, is not evidence. *Les. of Griffith v. Evans et al. 1 Peters' Rep. 166.*

A survey consisting of six sides, on three of which there is no mention of course or distance, and from which the quantity of land does not appear, is not evidence. *M' Clemens v. Graham, 2 Serg. & R. Rep. 460.*

A connected plot of different tracts, made and put together by an officer of the Land Office, and not appearing to be a copy of any plot of record in the office, is not evidence. *Les. of Griffith v. Tunchouser, 1 Peters' Rep. 418.*

A connected map of adjoining tracts of land, annexed to the deposition of a surveyor to shew that the land in dispute is covered by elder patents, may be given in evidence. *Jones v. Bache, C. C. Penn. April, 1813, M. S. Rep.*

A certificate of the Surveyor General that he had issued a special order to a deputy surveyor to survey lands, was allowed under special circumstances. *Les. of Todd v. Ockerman et al. 1 Yeates' Rep. 295.*

Chap. II. s. 2. Inquisitions taken before the Sheriff, &c. on ordinary occasions, are of very different authority; they are in their nature traversable, and are therefore seldom admitted as evidence against third persons. In one case, the Judges of the Court of King's Bench were equally divided on the question, whether the Coroner's inquest, whereby a man was found to be *non compos mentis*, was admissible against his executrix as evidence of his insanity; and it has also been determined, that an inquisition taken by the Sheriff, to ascertain to whom goods seized by him, under an execution against *A.* belonged, by which the property was found to be in *B.* was no evidence either for *B.* in an action

Vide 2 H.
Black. 437.

Jones v.
White,
1 Stra. 68.

A paper, in the nature of a certificate, from a former Surveyor General, that a survey had been made, copied from a book in the office, was held not admissible, but that the book might go to the jury. *Morris's les. v. Vanderen*, 1 Dall. Rep. 64.

A paper, certified by a former Surveyor General to be a true copy of the original in his office, purporting to be a return of a survey, and containing a draught made in pursuance of a warrant; but the paper not being signed, nor stating by whom or when made, a blank being left for the day and year, was ruled not admissible. *Penn's les. v. Hartman*, 2 Dall. Rep. 230.

In real actions, a plan taken *ex parte* of the land described in the narr. cannot be used as evidence. *Bearce v. Jackson*, 4 Mass. Rep. 408. *Gerrish v. Bearce et al.* 11 Do. 193.

A map of partition made nearly a hundred years ago, by virtue of an Act of the Legislature, being *ex parte*, is inadmissible to prove title. *Jackson ex d. Beckman et ux. v. Witter*, 2 Johns. Rep. 180. Vide *Jackson ex d. Klock et al. v. Kichtneyer*, 13 Do. 367.

Sharp's book of surveys has always been held admissible evidence in deducing titles under the *West Jersey* proprietors. *Denn v. Pond et al.* 1 Coxe's Rep. 378. Vide *Jackson v. Vandyke*, *ibid.* 28.

The draft of a survey found in the office of the surveyor of the district, purporting to have been made by *J. H. for the proper deputy*, a survey returned thereon by the Surveyor General, and a patent issued in pursuance of it, were held to be admissible. *Burd et al. v. Seabold*, 6 Serg. & R. Rep. 137.

The copy of a warrant, not under seal, sent by the Surveyor General to the deputy surveyor of the district with an order to execute it, is evidence. *Motz v. Bolard*, *ibid.* 210.

Copies of ancient proprietary grants are evidence, without proving the meeting legal at which they were granted. *Pitts v. Temple*, 2 Mass. Rep. 538.

The return of a deputy surveyor, is merely *prima facie* evidence of the truth of the matter returned. *Les. of Eddy v. Faulkner*, 3 Yeates' Rep. 530. in *Er. 1 Binn. Rep.* 188.

A certificate of the survey of land, without a patent, is no evidence of title to support an ejectment. *Seward v. Hicks*, 1 Har. & M. Hen. Rep. 22. *Sollers v. Bowen*, *ibid.* 193. Vide *Young v. Hawkins*, *ibid.* 148.

A copy of a certificate of survey, lodged in the land office, is good evidence. *Thornton v. Edwards*, *ibid.* 153.

A copy of a patent, either from the records of the Register's office, or from the County Court, is good evidence of title as the original would be. *Lee v. Tapscott*, 2 Wash. Rep. 276. Vide *Sutton v. Blunt*, 2 Hayw. Rep. 343. Vide *Young v. Hawkins*, *ibid.* 148.—AM. ED.

brought by him against the Sheriff,(1) or for the Sheriff in an action for a false return of the execution.(2) (1)

Chap. II. s. 2.
Parish Registers.

The register kept in churches of births, marriages and burials, is also evidence,(u) and in all civil cases, except actions for criminal conversation, a marriage may be proved by reputation;(3) but in this case, and on indictments for bigamy, either some person present at the marriage must be called, or the original register, or an examined copy of it produced,(x)* in which case the

(1) Latkow v. Exner, 2 H. Black. 437.

(2) Glossop v. Pole, 3 M. & S. 175.

(3) Morris v. Miller, 4 Burr. 2057.

(t) An inquisition made by a Sheriff's jury, to ascertain whether the property in goods taken on a *fi. fa.* is in the defendant or not, if found not to be in him, is a justification to the Sheriff for returning *nulla bona*, and a conclusive defense in an action against him for a false return; unless it be shewn that he did not act with good faith. *Bayley v. Bates*, 8 Johns. Rep. 143. Sed vide contra *Pearson v. Fisher*, 1 Car. Law. Repos. 460.

But where goods taken on an execution against B. were claimed by A. as his property, and the officer summoned a jury of inquiry, as to the claim, it was held that the inquisition was no justification in an action of trespass by A. but went only in mitigation of damages. *Townsend v. Phillips*, 10 Johns. Rep. 98. —AM. Ed.

(u) A copy of the register of the births and deaths of the society of Quakers in England, proved before the Lord Mayor of London, admitted in evidence to prove the death of a person. *Les. of Hyam v. Edwards*, 1 Dall. Rep. 2.

So the registry of any religious society in this State, is evidence by Act of Assembly, but it must be proved as at common law. A certified copy under seal is not evidence. *Stover v. Les. of Whitman*, 6 Binn. Rep. 416.

In *Copps v. Follen*, *Phillimore's Rep.* 145, it was held, that an erroneous entry in the register, did not vitiate the marriage.

And as to the register of a dissenting chapel, vide *Newham v. Raithby*, *ibid.* 315.

A certificate of a justice of the peace, is not evidence of a legal marriage, unless it state they were joined together by him, in legal marriage. *Mangue v. Mangue*, 1 Mass. Rep. 240.

The record of a baptism, made by the minister of the parish, who was dead, was received in evidence. *Huntley v. Comstock*, 2 Root's Rep. 99.

The copy of a register kept in the records of a town, is evidence of pedigree and heirship. *Jackson ex d. Miner v. Boneham*, 15 Johns. Rep. 226. —AM. Ed.

(x) On an indictment for adultery, the record of the marriage is not necessary, but it may be proved by witnesses. Indeed, witnesses are necessary to prove the identity of the parties. *Commonwealth v. Norcross*, 9 Mass. Rep. 492. *Commonwealth v. Barbarick*, 15 Do. 163.

In prosecutions for bigamy, and in actions for crim. con. an actual marriage must be proved. *The People v. Humphreys*, 7 Johns. Rep. 314. *Baker v. Metzler*, *Anth. N. P.* 193. and 195. n. a.

In an action for breach of promise of marriage, the declarations of the plaintiff that she had promised to marry the defendant, made long before the suit brought,

* In *May v. May*, 2 Str. 1073, on a question of legitimacy, it appeared that a general register-book was kept in the parish, into which the entries of baptism were made every three months from a day-book into which they were made at the time. In the day-book were put the letters BB, which were said to signify *born*; but these were not inserted in the register-book. *PROBYN* and *LEE*, Justices, were of opinion, that the register-book, being the public book, was to be considered as the

Chap. II. s. 2. parties may be identified by any one acquainted with them, whether present at the marriage or not. But the books of the *Fleet*,
Parish Registers.

Birt v. Harrow are good evidence for the plaintiff to shew the mutuality of the contract. *Peppinger*
Doug. 162. *v. Low*, 1 *Halst. Rep.* 384.

Cohabitation and having children, is evidence of marriage. *Tells et ux. v. Foster et al. Tayl. Rep.* 121. *S. C. 2 Hayw. Rep.* 102. Et vide *Purcell v. Purcell*, 4 *H. & Mayf. Rep.* 507. *Fenton v. Reed*, 4 *Johns. Rep.* 52. *Newburyport v. Boothbay*, 9 *Main. Rep.* 414. *Cockrill et al. v. Calhoun*, 1 *Nott & M. Cord's Rep.* 235. *Allen v. Hall et al.* 3 *Do.* 114. *Jackson ex. d. Van Buskirk v. Claw*, 18 *Johns. Rep.* 346. *Baker v. Metzler*, *Anth. N. P.* 193. and 195 *s. a.*

In *Pennsylvania*, marriage is a civil contract, which may be completed by any words in the present tense, without regard to form. *Hantz v. Sealy*, 6 *Binn. Rep.* 405. So in *Kentucky*, *Dumarsely v. Fishly*, 3 *Marshall's Rep.* 370.

In *New York*, a contract of marriage made *per verba de presenti*, amounts to an actual marriage, and is as valid as if made in *facie ecclesie*. *Fenton v. Reed*, 4 *Johns. Rep.* 52.

And in ordinary cases, an actual marriage may be inferred from cohabitation, acknowledgment, &c. of the parties. *ibid.*

In the case of *Cummings v. Cummings*, in the House of Lords, on an appeal from the Court of Sessions in Scotland, 2 *Dow. Rep.* 482, Lords ELLEN and REDFORD held, that in cases of cohabitation, the presumption was in favour of its legality, but where it was known to have been illicit in its origin, that presumption could not be made.

In the case of *M. Adam v. Walker*, in the House of Lords, on an appeal from the same Court, 1 *Dow's Rep.* 148, Lord ELLEN observes, that the canon law is the basis of the marriage law all over Europe, and by the law of Scotland, assent alone to a contract of marriage, *de presenti*, is sufficient to render the marriage binding, without being followed by *copula*, or other act to carry it into effect.

In *Cheseldine's les. v. Brewer*, 1 *Har. & M. Hen. Rep.* 152, it was decided that cohabitation, copulation, and agreement to become man and wife, was sufficient to legitimate issue.

In *South Carolina*, proof that two persons lived together as man and wife, will be conclusive if not rebutted. *Allen v. Hall*, 2 *Nott & M. Cord's Rep.* 114.—*Am. Ed.*

original entry from which evidence was to be given, and that it could not be controlled or altered by any thing appearing in the day-book. *PAGE J.* was of contrary opinion.

The following case was decided upon the same principles :

Rex v. Head, Worcester Spr. Assiz. 1762, cor. NOEL J. M. S. In an information for bribery, the prosecutor, to prove the party a freeman of *Evesham*, produced upon a 2s. stamp a copy of a loose paper upon a file, which the witness said was also on a 2s. stamp, to this effect : "Borough of *Evesham*, A. B. admitted to his freedom such a day." It appeared that there was a book, in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, and which was made when the party was originally admitted ; but this was not on stamp in the book ; and it was objected, that this being the original book of the corporation, a copy of this should have been produced ; but it appearing that such entry in the book was never upon stamps, but the short entries were filed upon stamps and kept amongst the corporation papers, *NOEL J.* said, that this entry being the only effectual act, as having that which the law requires, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and therefore a copy of it was good evidence.

however corroborated by other circumstances, are not, in any case, received as evidence of a marriage; not because a marriage celebrated there was not good, for such it clearly was before the marriage Act; but because the manner in which those marriages were celebrated, and the conduct of the persons who, without any legal authority, assumed the power of registering them, have thrown such an odium on those books, as to take from them even the authority of a private memorandum.*

The rolls of Courts baron are also received to prove the admissions, &c. of tenants, and either an examined copy, or one signed by the steward, may be read; so also rolls which contain entries of descents, &c. are evidence between the tenants to prove the customary course of descent within the manor; and even an entry on an ancient roll of a finding by the homage what the customs were, though not accompanied by any particular instance, or supported by other evidence, is itself admissible evidence to prove the custom; for this not being the claim of a private individual, but as it were the *lex loci*, tradition and received opinion, is evidence of it. On the same principle a customary roll of the manor of great antiquity, though not properly a Court roll, nor signed by any person, but delivered down with the rolls from steward to steward, has been deemed good evidence; and where a parchment writing, dated about a century since, and purporting to be signed by many persons copyholders of the manor, stated, that the commoners had an unlimited right, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner; such instrument was deemed to be evidence of the reputation of the general right, although not proved to have been signed by a majority of the copyholders of the manor, nor that the person against whom it was produced, held the copyhold tenement of any one of those who had signed it.

Similar to Court rolls and customaries, are ancient *terriers or surveys* of a parish or manor, which are either ecclesiastical or temporal. The ecclesiastical terriers are surveys made by virtue of the 87th canon, and are thereby ordered to be kept in the Bishop's registry; and *Godolphin* adds, (1) that it may be convenient to have a copy exemplified, and kept in the church chest; wherefore, it was in one case (2) holden, that a paper purporting

* So ruled by Lord KENTON in *Reed v. Passer*, *Peake's Cas.* 231; *Exp.* 213, S. C.; and by Lord C. J. DE GREY in *Howard v. Burtonwood*, C. B. Sittings at Westminster after Trin. T. 1776; and previously by Lord HARDWICKE and Lord C. J. LEE: but in *Doe dem. Passingham v. Lloyd, Shrewsb. Summer Assiz.* 1794, Mr. J. HEATH admitted them in evidence. See *Cooke v. Lloyd, Appendix.*

Chap. II. s. 2.
Rolls of
Courts Baron.

Birt v. Bar-
low, Dougl.
162.

Bul. N. P. 247

Doe dem. Ma-
son v. Mason,
3 Wils. 63.
Doe dem. Bee-
bee v. Parker,
5 T. Rep. 26.

Den dem.
Goodwin v.
Spray, 1 T.
Rep. 466.

Chapman v.
Cowlan,
13 East, 10.

(1) Reperto-
rium Canonici-
um, Append.

(2) Atkins v.
Hutton,
2 Austr. 386.

Chap. II. s. 2. to be a terrier, found in the charter chest of *Trinity College, Cambridge*, (who were landholders in the parish) was no evidence to disprove a *modus*; and indeed it may be laid down as a general rule, that all ancient documents, the authenticity of which are not proved by any extrinsic evidence, should appear to come out of the proper regular custody; thus, an instrument purporting to be an endowment without the seal of the Bishop, and another purporting to be an *inspeximus* of the first under his seal; coming out of the hands of a private individual entirely unconnected with them;(1) and in like manner a grant to an abbey, contained in a manuscript intituled *Secretum Abbatis*, and a similar instrument entered in what purported to be a chartulary of a priory, were rejected, though the one was brought from the *Bodleian Library*,(2) and the other from the *Cottonian MSS.* in the *British Museum*,(3) those places being merely the depositaries of curious antiquities, and not the place in which those to whom the instruments had belonged had deposited them as evidence of their rights. But where a similar chartulary was produced from the documents of a person who had become the owner of part of the estates of the abbey (although not of those in question) it was held by the Court of Exchequer (*Wood, Baron, Dissent.*) to be admissible;(4) and, as against one of the prebendaries of *Litchfield*, a terrier found in the registry of the dean and chapter of *Litchfield*, was also held to be sufficient evidence.(5)

(1) *Potts v. Durant*, 4 Gwill. 1450.

(2) *Meshele v. Roberts*, cited 3 Taunt. 91.

(3) *Swinner-ton v. Marquis of Stafford*, *ibid.*

(4) *Bullen v. Mitchell*, 2 Price, 399.

(5) *Müller v. Foster*, cited 2 Anst. 387.

(6) *Theory of Evidence*, 45. *Bul. N. P.* 248. *Vide Earl v. Lewis*, 4 Esp. Cas. 1. *Illingsworth v. Leigh*, 4 Gwill. 1618.

Maps.

Yates v. Harris, Hill. Ass. 1702. *Gillb. Law Ev.* 78. *Bridgman v. Jennings, Ltd.* Raym. 734.

Ibid. 1 Stra. 95. S. P.

Pollard v. Scott, Peake N. P. 18.

Ancient maps have generally been classed under this head of *public writings* not of record, though perhaps they would more properly have been considered as *private instruments*; however, as these are in some degree analogous to terriers, I shall here observe that an ancient map will be received as evidence where it has accompanied possession, and agreed with the boundaries as adjusted by ancient purchases. If two manors are in the hands of the same person, and a map is made by him, and afterwards one of the manors is conveyed to another person; and then, at a distant time, disputes arise as to the boundaries, the map so taken will be evidence; but if the person under whose direction the map was taken, was possessed of only one manor, or a Lord describes the boundaries of his waste, or the churchwardens cause a copper plate map to be made, wherein they

describe land which an individual claims to be a public highway, Chap. II. s. 2. in any of these cases, the map so taken is not evidence against Papal Licence and Bull. the rights of persons not parties to the making of it. (y)

The *Pope's license*, without the King's, has been held good evidence of an impropriation, because anciently, the Pope was taken for the supreme head of the church, and therefore was holden to have the disposition of all spiritual benefices, with the concurrence of the patron, without any regard of the prince of the country, and these ancient matters must be judged according to the error of the times in which they were transacted. Cope v. Bedford, Palm. 427.

So also the *Pope's bull* is evidence, upon a special prescription to be discharged of tithe, where it is contended that the lands belonged to a particular monastery, and were discharged at the time of the dissolution, for then they continue discharged by the Act of Parliament; but it is no evidence to prove a general prescription, which can only be from time immemorial, because it shews the commencement of the custom. An exemption under the Bishop's seal, is good evidence of the Pope's bull. Palm. 38. Sir T. Read's case, cited Hard. 118.

Corporation Books, concerning the public government of a city or town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained in them, so far as those facts go to ascertain the rights of the several members of the corporation *inter se*; but where the corporation is disputing with a third person, as in the case of tolls for instance, entries of other persons having formerly submitted to the demand, however ancient such entries may be, will be no evidence unless accompanied with a charge upon the persons making them, or such other circumstances as are deemed necessary to give authenticity to similar entries in the book of an individual. An old agreement being in the *Bodleian Library*, whence the *Oxford Statutes* prohibit its removal, a copy was in one case received in evidence; but, in general, that which is in its nature a private instrument, will not, by belonging to a public body, and remaining in their custody for a number of years, gain that degree of credit, which entitles a copy of it to be read in Books. Rex v. Motherall, 1 Stra. 93. Marriage v. Lawrence, 3 Barn. & Ald. 142. Downes v. Moreman, Banb. 189.

(y) A map is good evidence against parties to it. *Jackson les. of Tenbroke v. Vandyke*, 1 *Coxe's Rep.* 28.

An agreement of parties that a certain map should be filed in the Surveyor General's office, does not entitle it to be admitted in evidence as a record. *Derin ex. d. Bickham v. Pissant et al.* 1 *Coxe's Rep.* 220.

As to a plot attached to a survey, vide *Hickman v. Boffman*, *Hurd. Rep.* 359. Vide ante 129, n. s. AM, Ed.

Chap. II. s. 2. evidence; and therefore where a letter, fifty years old, was found in a corporation chest, the Court held that the original must be produced.(x)

Rex v. Gwin,
1 Stra. 401.

Public books of another description have, of late years, come into use, which, though in one point of view, they do not in the least resemble records, but are rather memoranda of the contracts of individuals; yet, as they concern the public in general, and are necessarily confined to one place, Judges have, by analogy to the case of records, permitted copies to be read in evidence. Thus it has been held, that to prove a transfer of stock in the *public funds*, copies from the *Bank books* are good evidence; and the like seems to be the case with respect to the books of the *East India Company* (though this point has not been expressly decided,) for they are equally within the principle, that "wherever an original is of a public nature, and would

Bretton v.
Cope, Peake,
N. P. 30.
Vide post.

Vide Doug.
593, note.

3 Salk. 154.

(x) Corporation books are evidence of the acts of the corporation, but it must appear that they are kept as such by the proper officer, or some person authorised to make entries in his necessary absence. *Highland Turnp. Co. v. McKeen*, 10 Johns. Rep. 154.

Evidence made by a clerk in the books of a corporation, by the direction of the trustees, are not evidence in a cause in which they are interested. *Jackson ex. d. Donally v. Walsh*, 3 Johns. Rep. 226.

The books of a corporation, established for public purposes, are evidence of its acts and proceedings. *Owings v. Speed*, 5 Wheat. Rep. 420.

The minutes of the commissioners of property, allowed to be given in evidence. *Les. of Weston v. Stammere*, 1 Dall. Rep. 2.

The acts of freeholders at meetings in *Connecticut*, according to their laws, are not admissible on a trial of title to land. *Humphrey v. Pison*, 1 Root's Rep. 259. *Austin v. Hanchet*, *ibid.* 314.

Books of a corporation are evidence in disputes between members of the corporation, but not against strangers. *Commonwealth v. Woolper et al.* 3 Serg. & R. Rep. 29.

An original corporation book, though not under the corporation seal, was ruled to be good evidence in an action by the corporation against one of its members. *Fleming et al. v. Wallace*, 2 Yeates' Rep. 120.

In *Virginia*, the treasury books are conclusive evidence of the balances on hand at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel. *Commonwealth v. Preston*, *Gilmer's Rep.* 235.

The secretary of a banking company is not a certifying officer; his copies, of the vote of the stockholders, must be sworn to. *The Bal. & Augusta Bank v. Hamlin et al.* 14 Mass. Rep. 178.

A copy of an entry in a book kept by a corporation, is not authenticated by the seal of the corporation; an examined copy must be produced. *Stoever v. Les. of Whitman*, 6 Binn. Rep. 416.

The book of a messenger of a bank, who was dead, in which, in the course of his duty, he entered memoranda of demands and notices to the promisees and endorsers upon notes left in the bank for collection, was received as evidence of a demand on the maker, and notice to the defendant, as endorser of a note so left for collection. *Welsh v. Barrett*, 15 Mass. Rep. 380.—AM. ED.

"be evidence if produced, an immediate sworn copy thereof
"is evidence."(a)

Chap. II. s. 2.
Bank Books.

(a) A copy of an order by which money has been drawn from the treasury of the Commonwealth, though sworn to be a true copy by the treasurer, will not be admitted as evidence, but the original order must be produced. *Terrey v. Fuller*, 1 *Mass. Rep.* 524.—*AM. ED.*

SECTION III.

Of the Inspection of Public Writings.

THOUGH all the documents mentioned in the two preceding Chap. II. s. 3. sections are of a public nature, yet it should be observed they are not for all purposes equally open to the public.

The proceedings of Courts of Justice may, it should seem, be inspected by every person who is interested in them.* (1) Copies from the books of *public offices* may also be called for by the persons interested, unless where public policy requires that the contents of them should not be disclosed. (2) (b). Thus, access has been granted to the books of the commissioners for settling

(1) *Herbert v. Ashburner*, 1 *Wils.* 297.

(2) *Wilson v. Rogers*, 2 *Str.* 1242.

Edwards v. Vesey, *Cas. temp. Hardw.* 128.

* In the cases cited, No. 1, leave was given to inspect the books of the Quarter Sessions, the Court of Conscience, and the Commissioners of Lieutenancy, as to proceedings against the party in the action; and where an action for false imprisonment was brought against the informer, the justice of the peace, who convicted the plaintiff, was ordered to give a copy of the information (*Welch v. Richards*, *Burnes*, 468;) but in *Grosvolt v. Burrell*, 1 *Lord Raym.* 252, and *Abney v. Dickenson*, *Say.* 250, where actions were brought for false imprisonment in the execution of the sentence of the College of Physicians in the one case; and of the order of the commissioners of hackney coaches in the other; the Court refused to grant rules for the plaintiff to inspect their books, on the ground that the persons in whose custody they were, were no parties to the suit. So where the president of a military Court of Inquiry was sued by an officer, on whose conduct he had made a report, as for a libel contained in such report, it was held that the report was a privileged communication, and could not be read in evidence either directly or by an office copy. *Borne v. Ld. C. F. Bentinck*, 2 *Brod. & Bing.* 120.

(b) It seems that the books of the Land Office and of the Board of Property, are records. *Ream v. Commonwealth*, 3 *Serg. & R. Rep.* 207.

Minutes of the Commissioners of Property were allowed to be given in evidence. *Les. of Westons v. Stammers*, 1 *Dall. Rep.* 2.

The minutes of the Board of Property are not evidence of any fact but what passes immediately before it. *Deal et al. v. Mc Cormick*, 3 *Serg. & R. Rep.* 343. Et vide *Carothers et al. v. Les. of Dunning*, *ibid.* 384.—*AM. ED.*

- Chap. II. s. 3. the debts of the army, at the prayer of an officer's widow ;(1) but refused to the books containing an account of the revenue, for the purpose of settling a mere idle wager as to the amount of the duties.(2) In like manner, the books and muniments of a corporation containing the rights of its members are open to all of them ; and if, when a suit is depending, application be made to the person who has the custody of them, and he refuses an inspection, the Court in which it is so depending, will compel him to give it.(3) But when a dispute takes place between the corporation and an individual, who is no member of it, as when a corporation sues a stranger for tolls,(4) the corporation being as to him the same as a private person, a Court of Justice will not grant an inspection of the books in order to enable the party to find evidence against the body with whom he is contending ; any more than they would to inspect private title deeds, if the dispute existed between two individuals.
- (1) Moody v. Thurston, 1 Stra. 304.
- (2) Atherfold v. Beard, 2 T. Rep. 616.
- (3) Rex v. Hollister, Cas. temp. Hardw. 245. Rex v. Fraternity of Hostmen in Newcastle upon Tyne, 2 Stra. 1223.
- (4) Mayor of Southampton v. Graves, 3 T. Rep. 590.
- (5) Baldwin v. Trudge, Barnes, 237.
- (6) Hobson v. Parker, Ibid. The same principle applies to the *Court rolls* of a manor ; as between the Lord and the tenants, or between the tenants themselves, they ascertain the rights of the respective parties, and are therefore open to all ; so that if a Lord claim an amercement,(5) or two tenants are disputing about the custom of a manor,(6) the tenant has, in either case, a right to inspect, and use as evidence, the rolls relating to his title ; and, if the Lord refuse the inspection, the Court will make a rule on his steward for that purpose ;(7) and every man who has a *prima facie* title to a copyhold, is entitled, though no cause be depending, to have such inspection.(8) But if the dispute be between the Lord and a stranger, as if the Lord plead a *modus* in a suit by the parson for tithes,(9) or bring an ejectment for lands, claiming them as copyhold, when the defendant contends they are freehold ;(10) or the Lords of two neighbouring manors dispute about the boundaries,(11) the Lord is not obliged to produce, nor will a Court of Justice compel him to shew the rolls of his manor ; for in this case they are considered as mere private deeds in which the other persons have no property ; and therefore if it be necessary to give them in evidence against him, the same previous steps must be taken, and the same evidence given as in all other cases of private deeds, in possession of the adversary, of which I shall have occasion to speak in the next section.
- (7) Hobson v. Parker, Barnes, 237.
- (8) Rex v. Lucas, 10 East, 235.
- (9) Bishop of Hereford v. Duke of Bridgewater, Baub. 269.
- (10) Smith v. Davis, 1 Wils. 104. Vile 3 T. Rep. 151.
- (11) Talbot v. Villibors, cited 3 T. Rep. 142.

The several instances before mentioned, in which inspection of public books was granted, were cases in which the person applying was claiming or contesting a civil right ; but in no case where a criminal prosecution has been commenced, will a Court of Justice compel the party against whom such prosecution is

carried on, or a public body, of which he is a member, to grant such inspection; for this would, in effect, be obliging the person accused of a crime to furnish evidence against himself, (1) which is contrary to one of the first and most humane maxims of the law of *England*; and therefore, when an information was filed against corporation justices for taking money to grant licences, (2) and a similar prosecution commenced against the Vice-Chancellor of *Oxford* for misbehaviour in his office, (3) the Court refused to grant an inspection of the corporations books in the one case, and of the Statutes of the University in the other; so if an information be granted for bribery at an election, (4) or against overseers for making an illegal rate, the Court will not in either case grant a rule for the inspection of the corporation or parish books. (c) And, in a late case, where *A.* had by the authority of a parish vestry, made a report in writing respecting the conduct of *B.* founded, as it was stated, on the inspection of certain documents then in the parish chest, but which had since got into the possession of *B.* who claimed to be vestry clerk, and *B.* brought an action against *A.* as for a libel contained in the report, the Court of King's Bench refused to compel *B.* to produce or permit *A.* to take copies of the documents so in his possession. (5)

But informations, in the nature of *quo warranto*, (6) though in form criminal prosecutions, do not fall within the reason of the last class of cases, for they are in effect proceedings to ascertain civil rights; and therefore, when a rule has been obtained for an information, by a person who is a member of the corporation, it is considered as matter of course for the Court to grant a rule to inspect the corporation books; but it has never been decided that a relator, who is a stranger to the corporation, shall have such inspection. Indeed it is hardly possible that the question should ever arise, for, unless the title of a person in possession of an office is objected to on some public ground which concerns the whole community, as for not having taken the sacrament, or some such general objection, (7) the Court will hardly ever disturb the peace of corporations by listening to the application of a mere stranger; and even when a member of the corporation is the relator, the inspection granted to him is confined to such documents as concern the point in dispute, (8) within which limitation all inspection of public documents is confined. (9)

(c) Vide post.

(1) *Vide* 2 Stra. 1211. 1 Wils. 241.

(2) *Regina v. Mead*, 2 Lord Raym. 927.

(3) *Rex v. Cornelius*, 2 Stra. 1210.

(4) *Rex v. Purnell*, 1 Wils. 239, 1 Black. 37.

(5) *Rex v. Haydon*, 1 Black. 351.

(6) *May v. Gwynne*, 4 B. & A. 302.

(7) *Rex v. Lee*, there cited, and 1 Wils. 240.

(8) *Rex v. Brown*, 3 T. Rep. 574, note.

(9) *Rex v. Babb*, 3 T. Rep. 579.

(9) *Benson v. Fort*, cited 1 Wils. 240, &c.

SECTION IV.

Of Instruments of a private nature.

Chap. II. s. 4.
Deeds, &c.

10 Co. 92.

(1) *Vide Read v. Brookman*,
3 T. Rep. 151.

(2) *Robinson v. Davies*,
1 Stra. 526.

(3) *Young v. Holmes*,
1 Stra. 70.

WE now proceed to the consideration of written evidence, of a very different description from that noticed in the preceding sections, viz. the mere private instruments of the parties, or of those through whom they claim. We have observed that documents of a public nature are, for the most part, confined to a particular spot, and liable to be called for by several persons at the same time; for which reason, and also on account of the authority which the law gives to acts done under its immediate sanction, Courts of Justice, in such cases, permit examined copies to be given in evidence. But of private deeds, or other instruments, the production of the original,* if in existence, and in the power of the party using it, is always required; till which done, no evidence whatever of the contents can be received; but where the original has been destroyed, or lost by accident, (1) as where an original award was lost in a mail which was robbed; (2) or being in the hands of the adverse party, notice has been given him to produce it, (3) then an examined copy, or even parol evidence of the contents, being the best evidence in the power of the party, is received; (4) it being first proved, that the

* It has been said that even the counterpart of a deed cannot be read in evidence without some account of the original, (*Salk.* 237,) and the general practice is to give notice to a tenant to produce the original lease, in an action by his landlord against him; but there can be no reason why the copy, or rather the duplicate of the deed executed by the party himself, should not be evidence of the whole contents of it against him; though if the demise came in question in an action against the lessor, or a third person, it certainly would not. In a late case, where a declaration for not stamping an indenture of apprenticeship, stated that A. put himself apprentice to the defendant, the part of the deed executed by him was held sufficient evidence, without production of or notice to produce the other part executed by A. *Burleigh v. Stibbs*, 5 T. Rep. 465. So in an ejectment by landlord against tenant, for a forfeiture, the lessor of the plaintiff proved the counterpart of the lease executed by the defendant; but having given no notice to produce the original, an objection was taken by the defendant's counsel, that the counterpart could not be read. *LAWRENCE J.* ruled that it was sufficient, saying it was an acknowledgment by the defendant, under his hand and seal, that the lessor of the plaintiff had demised to him, and that he had become tenant under the terms mentioned in the counterpart. *Roe dem. West v. Davies*, *Gloucester Spring Ass.* 1806: and the Court afterwards refused a new trial. 7 East, 363.

(4) Parol evidence of the contents of written papers, is not admissible, unless they are proved to be lost or destroyed, or in the possession of the adverse party, and not produced upon notice. *Campbell v. Wallace*, 3 Yeates' Rep. 271. *De Haven v.*

original, of which such secondary evidence is offered, was a ge- Chap. II. s. 4.
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Henderson, 1 *Dall. Rep.* 424. *Lawrence v. The Ocean Ins. Co.* 11 *Johns. Rep.* 260. *Waring v. Warren*, 1 *Johns. Rep.* 340. *Rogers et al. v. Van Hoesen et al.* 12 *Do.* 331. *Dobbin v. Watkins*, *Cole. Cas.* 33. *Fraux v. Fraux*, *Penning. Rep.* 166. *Jackson ex d. Livingston et al. v. Frier*, 16 *Johns. Rep.* 193. And even without notice, *Taunt. & S. Bost. Turnpike Corp. v. Whiting*, 10 *Mass. Rep.* 327. *Cady v. Eggleston et al.* 11 *Do.* 282. But it cannot have the effect as if defendant refused after notice. *ibid.* *Storer v. Batson*, 8 *Do.* 431. Et vide *Isaacs v. McGrath et al.* 1 *Nett & McComb's Rep.* 573. *Bunch v. Hurst*, 3 *Eq. Rep.* 390. *Nicholson v. Hilbard*, *Carolina Law Repos.* 253. *Richards v. Stewart*, 3 *Day's Rep.* 328. *Andrews et ux v. Hooper*, 13 *Mass. Rep.* 475. *Les. of Packer v. Gonsalus*, 1 *Serg. & R. Rep.* 526. *Denn les. of Baker v. Webb*, 1 *Hayw. Rep.* 43. *Garland v. Goodlee's adms.* 2 *Do.* 351.

Parol evidence that an indenture of apprenticeship was executed conformably to law will not be admitted unless it is proved to be lost. *St. Clair v. Jones*, *Addis. Rep.* 343. Nor of a lost deposition by a deceased witness, the party offering it having had it in his power to supply the loss in the life time of the witness. *Les. of McCally v. Franklin*, 2 *Yeates' Rep.* 340.

A deposition is not evidence to prove the contents of a paper not shewn to be lost or mislaid. *McKee v. Reiff*, 4 *Yeates' Rep.* 340.

In ejectment by a purchaser at Sheriff's sale against a stranger, the plaintiff cannot give parol evidence of a deed, by which the title was conveyed to the defendant in the execution, without shewing that all reasonable endeavours had been used to obtain the original. *Little et al. v. Les. of Delancey*, 5 *Binn. Rep.* 266.

A witness once entitled to lands, may prove that he transferred them to another, where his deed is lost. *Les. of Fagler v. Evig et al.* 2 *Yeates' Rep.* 119.

Parol evidence is admissible to prove the contents of a writing which is the immediate subject of the action, without notice to defendant to produce it. But it is not enough that it is referred to in the narr. *Alexander v. Coulter et al.* 2 *Serg. & R. Rep.* 494.

In an action for a breach of defendant's agreement to keep fair and regular books, parol evidence cannot be given of the contents of a book not in defendant's possession at the trial, and which no notice had been given him to produce. *ibid.*

Parol evidence of the contents of a deed proved to be lost, is not admissible, as the party might have obtained a confirmation, or an order of Court, under the Act of 1786, (2 *Sm. L.* 375.) *Hamilton v. Van Swearingen*, *Addis. Rep.* 43.

The Act of 27th February, 1798, which authorises the Court to enter judgment against the party who refuses to comply with an order for the production of papers, does not affect the common law principle, as to the admission of parol evidence of papers which the party has refused to produce on notice. *Alexander v. Coulter et al.* 2 *Serg. & R. Rep.* 494.

In ejectment by the Sheriff's vendee against A. the plaintiff claiming under a judgment and execution against B. the uncle of A. parol evidence was admitted of a deed by which the land in controversy was conveyed to B. without proof of notice. *Edgar's les. v. Robinson et al.* 4 *Dall. Rep.* 132. But in this case there was something particular. Per TILGHMAN C. J. and YATES J. 5 *Binn. Rep.* 270. 273.

The bare circumstance of the party not having it in his power to produce a paper, is not sufficient reason for admitting parol evidence. The question will be, whether with proper exertions he might not have had it in his power—and sometimes, if the paper be in existence, whether its production is not indispensable. *Gray v. Pentland*, 2 *Serg. & R. Rep.* 31.

It seems there is no case where parol evidence has been admitted, merely because the paper is in the hands of a third person, and a *subpoena duces tecum* has been refused. *ibid.*

Chap. II. s. 4. nuine and valid instrument, (1) * and that all due diligence has,

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(1) Goodier
v. Lake,
1 Atk. 446.

A paper noticed to be produced and called for, is evidence; and the party noticing, has not a right first to inspect it. *Lawrence et al. v. Van Horne et al.* 1 *Caines' Rep.* 276. Sed *quere Kenny v. Clarkson et al.* 1 *Johns. Rep.* 385. *Roundtree v. Tibbs* 4 *Hayw. Rep.* 108.

If the party who gives the notice, waives reading the papers in evidence, he may do so, and they are not made evidence by the notice. *Blight v. Ashley*, 1 *Peters' Rep.* 22.

Books called for do not become evidence by merely inspecting them, without asking questions. *Rumsey v. Lovell*, *Anth. N. P.* 12. *et. n. b.* Et vide *Farm. & Mech. Bank v. Israel*, 6 *Serg. & R. Rep.* 293.

Where books are produced on notice, and entries are read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former, if made prior to the commencement of the suit. *Withers v. Gillespey*, 7 *Do.* 10.

It seems the rule is different, if the party merely inspect the books with the view to their being used. *ibid.*

If the party producing is one of the parties to the deed, it is *prima facie*, to be taken as duly executed, and may be read. *Betts v. Badger*, 13 *Johns. Rep.* 223. Et vide *Jackson ex. d. Stewart v. Kingsly*, 17 *Do.* 158. Sed contra *Anth. N. P.* 19, 20. *n. b.* But a plaintiff producing a deed under which he holds an estate, forms an exception to the rule. *ibid.*

Although a will is produced by a party to an ejectment on notice, it cannot be read unless it has been proved according to the laws of the State. *Hylton v. Brown*, *C. C. Penn. April*, 1806, *M. S. Rep.*

In *Sayer v. Kitchen*, 1 *Esp. Rep.* 211, Lord Kenyon held, that if one party calls for the other party's books, but when they are produced declines using them, the mere calling for them will not make them evidence for the adverse party.

But in *Wharam v. Routledge*, 5 *Esp. Rep.* 235, Lord Ellenborough says, "you cannot ask for a book of the opposite party, and then determine whether you will use it or not, if you call for it, you make it evidence for the other side, if they think fit to use it.

If there is not conclusive evidence of the destruction of a will, to entitle a party to give it in evidence, he must shew that diligent search was made in those places where it was most likely to be found, if in existence. *Jackson ex. d. Bush et al. v. Hasbrouck*, 12 *Johns. Rep.* 192.

Under the Act of Assembly of Vermont, the Court will not, during the trial, order the party to produce a paper *instantly*, but there must be reasonable notice. *Hastings v. Powers*, 1 *Tyl. Rep.* 272.

Where the opposite party has the original, and refuses to produce it, a copy will be received in evidence. *Sedgwick v. Waterman*, 2 *Root. Rep.* 434. *Surer v. Batson*, 8 *Mass. Rep.* 431. Vide *Taunt. & S. Boston Turnp. Corp. v. Whiting*, 10 *Do.* 332.

A party will not be entitled to read a copy of the sailing orders, the original of which is in the opposite party's hands, unless notice has been given to produce them which has not been complied with. *Smallwood et al. v. Mitchell et al.* 2 *Hayw. Rep.* 146.

On an indictment for stealing a bank note, &c. under the Statute, in *New York*,

* Where an instrument requiring a stamp is written on plain paper, and afterwards lost or destroyed, though by the adverse party, no evidence can be received of its contents. *Rippner v. Wright*, 2 *Barn. & Ald.* 478. *Rex v. Cattle Morton*, 3 *Barn. & Ald.* 588. But if the adverse party withhold it, the Court will order him to produce it to be stamped. *Bateman v. Phillips*, 4 *Taunt.* 167.

in the case of a lost deed, been used to regain the possession of

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(*N. R. L.* 174, sec. 24, ch. 88) parol evidence of the contents is admissible, without accounting for their non-production. *The People v. Holbrook*, 13 *Johns. Rep.* 90.

To prove the loss of a written instrument, it must be shown that diligent search and inquiry have been made of those persons in whose possession it would have been had it ever existed. *Jackson ex d. Livingston et al. v. Frier*, 16 *Johns. Rep.* 193.

The testimony of a person to whose care a paper has been entrusted, that he had made search and could not find it, is evidence of its loss. *Jones et al. v. Fales*, 5 *Mass. Rep.* 101.

On an indictment for forgery, if the instrument alleged to have been forged, have been secreted to protect the defendant, even without his knowledge, a copy of the instrument, taken by the person whose name is forged and who had seen the instrument, is admissible. *Commonwealth v. Snell*, 3 *Mass. Rep.* 82.

In *Connecticut*, it has been decided that the writing alleged to be forged should be produced. *State v. Blodget*, 1 *Root. Rep.* 534. The same as to coin, *State v. Osbourn*, *ibid.* 152.

In the case of *Ross v. Bruce*, 1 *Day's Rep.* 100, it was decided, that evidence, that a note is in the hands of the defendant, and that it was forged, was admissible without producing it.

Parol evidence is admissible to prove the contents of promissory notes, which are lost. *Jones et al. v. Fales*, 5 *Mass. Rep.* 101.

An extract of a lost letter cannot be given in evidence, though the witness by whom its correctness is offered to be proved, be ready to swear that there was nothing in it relating to the matter in controversy. *Dennis v. Barber et al.* 6 *Serg. & R. Rep.* 490.

A copy admitted on notice during the trial to the other party to produce the original and he failing to do so. *McDowall v. Hall*, 2 *Bibb's Rep.* 612.

The cashier of a bank is a competent witness for the bank to prove that a note belonging to the bank was lost while he was cashier. *Strafford Bank v. Connell et al.* *Adam's Rep.* 193.

The copy of a deed from the record is evidence, if the original is in the possession of another, it is the best evidence the nature of the case will admit. *Sherwood v. Hubbel*, 1 *Root. Rep.* 498. *Parker v. Smedley*, 2 *Do.* 386. *Balsey v. Fanning*, *ibid.* 100.

The recording of a deed is *prima facie* evidence, and no more, that the deed was legally proved, and admitted to record. *Les. of Talbot v. Simpson*, 1 *Peters' Rep.* 138.

An attested copy of a recorded deed, is *prima facie* evidence of the title, and will be received when the original cannot be obtained. *Parker v. Smedley*, 2 *Root's Rep.* 386.

The copy of a deed enrolled in the King's Bench in *England*, and proved before the Lord Mayor of *London*, to be a true one, was allowed in evidence to support a title to lands in the province. *Les. of Hyam v. Edwards*, 1 *Dall. Rep.* 1.

A deed executed in *England*, and acknowledged here, though not recorded, was read in evidence. *Morris's les. v. Vanderen*, 1 *Dall. Rep.* 66.

An exemplification of a deed recorded in *Philadelphia* county, for lands lying in several counties, was received in evidence, the original being shown to be lost. *Les. of Scott v. Leather*, 3 *Yeates' Rep.* 184.

Quere, Whether the copy of a deed for lands in two counties, and recorded in one only, is evidence in ejectment for lands, in the county in which it is not recorded where the original is not proved to be lost. *Vickray v. McKnight*, 4 *Binn. Rep.* 204.

An exemplification of a deed certified by the recorder of one county, conveying lands lying in that and another county, is evidence in a dispute concerning the lat-

Chap. II. s. 4. it.(e) Proof by a witness who had the instrument, that it was thrown aside as of no further use, and therefore that he believes it to be lost, is sufficient ;(1) for, as was observed in a late case,

(1) *Rex v Johnson*, 7 East, 66. 8 East, 284. Vide *Brunater v. Sewell*, 3 M. & S. 296.

it is a very different thing whether the subject of inquiry be an useless paper, which it may reasonably be supposed to be lost,

ter. *Lezure v. Hillegas*, 7 Serg. & R. Rep. 313. Such also has been the decision of the Circuit Court of the U. States, Penn. District. *M. Keen v. Delancy's les.* 5 Cranch's Rep. 22.

The copy of the manifest of a vessel, (the Act of Congress of 2d March, 1799, having required it to be recorded,) certified under the hands and seals of the custom house officers, and proved by a witness to have been compared with the record, was admitted as evidence on an indictment for destroying a vessel at sea. *U. States v. Johns*. 4 Dall. Rep. 413.—AM. Ed.

(e) The general rule is, that before a copy can be received, the existence and loss or destruction of the original must be proved. *Meyer et al v. Barker*, 6 Binn. Rep. 234.

Nor can it be read without satisfying the Court that the original was genuine, yet where it is contained in the record of a foreign Court, and read without objection, it is then too late to object. *Russell v. Un. Ins. Co. C. C. Penn. April, 1806, M. S. Rep.*

Where an original deed, on which suit has been brought, is traced from the plaintiff to his attorney, who believes it to have been lost while in his possession, a copy may be given in evidence, without affidavit by the plaintiff that it is not in his possession. *Meyer et al v. Barker*, 6 Binn. Rep. 228.

On a trial for treason, a copy of a letter inciting to insurrection, was admitted on proof that it was one of the copies actually circulated and at that time. *U. States v. Mitchell*, 2 Dall. Rep. 357.

A copy of a cancelled bond, in the possession of the party, may be read in evidence after notice to produce the original, without first shewing how it came to be cancelled. *Drum v. Les. of Simpson*, 6 Binn. Rep. 478.

Where an original paper is in the hands of an attorney, under such circumstances that he cannot be compelled to produce it, the party may prove and exhibit a copy. *Lynde v. Judd*, 3 Day's Rep. 499.

A copy of a letter, proved to be a true copy of an original, put in the post office, directed to the defendant's intestate, without notice to produce the original, is not evidence. *Patton's adms. v. Ash*, 7 Serg. & R. Rep. 116.

Before a party can go into the contents of a lost deed, he must prove the existence or execution of it, and its loss; or give some other account from which the latter may be inferred. *Howell et al. v. House*, 2 Rep. Const. Ct. S. Car. 83. Et vide *Grimes v. Talbot*, 1 Marsh. Rep. 205.

Of evidence to prove a lost note, vide *Peabody v. Denton et al* 2 Gall. Rep. 351.

Parol evidence of the contents of a letter of attorney, may be produced, if the person to whom it is given, prove it to be lost. *Livingston v. Rogers*, 1 Caines' Cas. in Er. xxvii. 2 Johns. Cas. in Er. 488.

Where a deed is offered in evidence, the Court may decide whether it is sufficiently proved, and admit or reject it accordingly, or they may refer the evidence to the jury, instructing them to disregard it, unless they are satisfied with the proof of its execution. *Commissioners of Berks County v. Ross*, 3 Binn. Rep. 539. Vide *M. Cerkle v. Bints*, 5 Do. 348.

Where a deed is executed by virtue of a power of attorney, it should be produced at the trial. *Johnson v. Mason*, 1 Esp. Rep. 89. *Farborough v. Beard, Taylor*, 25. *White et al. v. Skinner*, 13 Johns. Rep. 307.—AM. Ed.

or whether it is an important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned.(1)(f) So in a settlement case, where there was only one part of an indenture, an application to the apprentice, since deceased, and his declaration that he burnt it when the term expired, with an application to the executor of the master, and a declaration by him that he knew nothing about it.(2) But in a case where two parts of an indenture had been executed, and one part having been destroyed, application had been made to the party who had the other part, his declaration that he could not find it, was considered as insufficient without calling him as a witness.(3) (g)

If the original instrument is supposed to be in the hands of a third person, he should be served with a *subpœna duces tecum* to produce it; and lest he should have delivered it to the adverse party before the service of the subpœna, it may be prudent also to give notice to the latter to produce it. But if, after service of the subpœna, the person in whose possession the instrument then was, deliver it to the other party for the purpose of avoiding the effect of the writ, this will not render it necessary to give him notice to produce it, but the party so calling for it may, in such case, give parol evidence of its contents.(h)

(f) The party himself must prove the loss of a deed, and no one can do it for him. *Blanton v. Miller*, 1 *Hayw. Rep.* 4. *Wilcox v. Ray*, *ibid.* 410.

But he can prove nothing more. *Seckright ex d. Wright et ux. v. Bagan*, *ibid.* 178.

Where an original deed, on which suit has been brought, is traced from the hands of the plaintiff to his attorney, who believes it to have been lost while in his possession, a copy may be given in evidence, without affidavit by the plaintiff, that the original is not in his possession. *Myer et al. v. Barker*, 6 *Blun. Rep.* 228.—*Am. Ed.*

(g) Where there are two persons who admit themselves to be tenants in common, a Court of Equity will order the production of title deeds, in the hands of either, for the other's inspection. *Lambert v. Rogers*, 2 *Mintvale's Rep.* 480.—*Am. Ed.*

(h) In an action for a libel, parol evidence cannot be given of the contents of a deposition, sent to the Governor of the State, containing charges against a public officer, though the Court had refused a *subpœna duces tecum*, and though the Governor declined giving the deposition to the plaintiff. *Gray v. Pentland*, 2 *Serg. & R. Rep.* 31.

Notice to produce a writing on the trial, is not spent, by the cause not being tried, at the next circuit. *Jackson ex d. Burr v. Shearman*, 6 *Johns. Rep.* 19. Et vide *Gilmere v. Wale*, *Auth. N. P. Cas.* 48.

If after notice, he puts it out of his power, he ought to apprise the opposite party. *Jackson ex d. Burr v. Shearman*, 6 *Johns. Rep.* 19.

A surety in a bond for a Sheriff's faithful performance of his duties, who has obtained possession of the books after his death, insolvent, shall be obliged to pro-

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If there be a subscribing witness who is living, and in a situation to be examined, he is the only person competent to prove the execution, because he may know and be able to explain facts attending the transaction which are unknown to a stranger; and for this reason, it has been held that a confession or acknowledgment of the party to the deed, whether it is offered as evidence against him,(1) or against a third person,(2) will not excuse this testimony.* This rule of evidence extends to all cases, whether the deed be an existing instrument or cancelled,(3) and even if it be lost,(4) and parol evidence given of its contents, the subscribing witness, if known, must be called; but if he is not known, any other person who has seen it, is a competent witness.(i)

(1) Johnson v. Mason, 1 Esp. Ca. 89.

(2) Abbot v. Plumbe, Doug. 216.
Laing v. Raine, 2 Bos. & Pul. 85.

(3) Bretton v. Cope, Peake, N. P. 30.

(4) Keeling v. Ball, Appen-
dix, 37 Geo. 3.

duce those books in evidence, on a *subpoena duces tecum*, in a suit between other persons, notwithstanding the surety was apprehensive of danger to himself from the exhibition of the books. *Hawkin's exrs. v. Sumter et al. & Desauts. Eq. Rep.* 102. 446.—AM. ED.

* In the case of *Call v. Dunning*, 4 East, 53, the Court held that even the admission of the execution of a bond in answer to a bill in Chancery, filed for the express purpose of obtaining such admission, was not sufficient without evidence to account for the non-production of the subscribing witness. And where a notice to quit was served on a tenant, which notice was attested by a witness, it was also held that proof of the service on the tenant, and that he did not object, was not sufficient without calling the subscribing witness. *Doe dem. Sykes bart. v. Durnford*, 2 Maule & Selwyn, 62. But when a man, on his examination before commissioners of bankruptcy, produced a bill of sale from the bankrupt, and admitted the execution of it in his deposition, this was held sufficient evidence of it against him in an action of trover which the assignees afterwards brought to recover the goods taken under it. *Bowles v. Langworthy*, 5 T. Rep. 366. So if a man agree, pending a cause, to admit a deed on the trial, this also will dispense with the necessity of calling the subscribing witness. *Laing v. Raine*, 2 Bos. & Pul. 85.

(i) The best evidence of the execution of an instrument is the testimony of the subscribing witness; the next best is proof of the hand writing of the witness, and this will be admitted when the witness is dead or out of the jurisdiction of the Court. *Clark exr. v. Sanderson exr.* 3 Binn. Rep. 192. *Les. of Peters et al v. Condron et al.* 2 Serg. & R. Rep. 80. *Engles et al. v. Bruington*, 4 Yeates' Rep. 245. *Stump v. Hughes*, 5 Hayw. Rep. 93. *Lewis's heirs v. Lingo*, 3 Marsh. Rep. 247. *Sluby v. Champlin*, 4 Johns. Rep. 461.

So if the witness has become interested since the time of subscribing, although the interest arises by his own voluntary act. *Les. of Hamilton v. Marsden*, 6 Binn. Rep. 45. *Lautermilch exr. v. Kneagy*, 3 Serg. & R. Rep. 202. Vide *Davidson's les. v. Bloomer*, 1 Dall. Rep. 123. In *Hamilton v. Williams*, 1 Hayw. Rep. 139, it was made a question. Et vide 2 Do. 101. 329.

If the witness becomes executor or administrator of the obligor in a bond, his hand writing may be proved. *Les. of Hamilton v. Marsden*, 6 Binn. Rep. 45.

Where the subscribing witness resides in a distant county, evidence of the hand writing is not admissible in the *Common Pleas*, as that Court may issue *subpoenas* to any part of the State. *Hautz v. Rough*, 2 Serg. & R. Rep. 349.

In debt on bond, on the plea of *non est factum*, where the subscribing witness was

Subscribing witnesses are not however necessary to the validity of a deed,⁽¹⁾ and therefore if there be none, or the subscribing witness being called, denies having seen the instrument

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unable to prove the execution, evidence of parol declarations of the defendant that he had executed the bond, were sufficient. *Taylor v. Meekly*, 4 *Yeates' Rep.* 79.

(1) Comyns's
Dig. Fait.
(B.) 4. Vide
1 Lev. 25.

A deed may be read, if proof be made of the hand writing of one of two of the subscribing witnesses, who was supposed to be dead, and no such person as the other could be found after diligent search. *Powers et al. v. M'Ferran et al.* 2 *Serg. & R. Rep.* 44. Et vide *Den ex d. Haggard v. Mayfield*, 5 *Hayw. Rep.* 181.

Where the only subscribing witness to a receipt had made a deposition, and seven days before the trial, went out of the jurisdiction of the Court, without having been subpoenaed, but without the party having been apprised of his intention, it was held that his hand writing might be proved. *Hamilton v. M'Guire*, 2 *Serg. & R. Rep.* 478.

A deed of sixty years and upwards, without being accompanied with possession, was read in evidence as proof of the hand writing of one witness, the other witness not being known. *Les. of Thomas v. Horlocker*, 1 *Dall. Rep.* 14. Vide *Jackson ex d. Livingston et al. v. Burton*, 11 *Johns. Rep.* 64.

So a deed executed by two persons with one wax and another ink seal, and attested by one witness, and proved by him before a justice of the peace, was admitted in evidence. *M'Dill's les. v. M'Dill*, 1 *Dall. Rep.* 63. Et vide *Hamilton's les. v. Galloway*, *ibid.* 93.

But if there be two witnesses to a deed, and one has become interested, the other must be produced or accounted for, before the hand writing can be proved. *Davison's les. v. Bloomer*, *ibid.* 123.

In an action on a note under seal, and attested by witnesses, the subscribing witnesses must be called or accounted for, and evidence of the hand writing of the defendant who executed the note cannot be received. *January v. Goodman*, *ibid.* 908. Et vide *Shaver v. Ehle*, 16 *Johns. Rep.* 201. *Williams v. Davis et ux.* 1 *Penn. Rep.* 277. *Allen v. Martin*, 1 *Car. Law Repos.* 373. *Hart's exrs. v. Coram*, 3 *Bibb's Rep.* 26. So to a receipt to which there is a witness. *Heckeri et al. v. Haine*, 6 *Binn. Rep.* 16.

Where there were two witnesses, one of whom was dead, the plaintiff was allowed to account for the absence of the other witness, in order to let the hand writing of the deceased witness be proved. *Douglass les. v. Sandersen*, 2 *Dall. Rep.* 116. *S. C. 1 Yeates' Rep.* 15. Vide *Oliphant v. Taggart*, 1 *Bay's Rep.* 255.

So where he eludes the process of the Court. *Baker v. Blount*, 2 *Hayw. Rep.* 404.

Where there is a subscribing witness to a deed, he must be produced. *Turner v. Ship*, 1 *Wash. Rep.* 322.

In an action of debt upon bond, where the witness could not be found, his hand writing was proved, and the bond given in evidence. *Jones v. Brinkley*, 1 *Hayw. Rep.* 20. *Cooke et al. v. Woodrow*, 5 *Cranch. Rep.* 13. *Mills et al. v. Twist*, 3 *Johns. Rep.* 94.

If the wife of the obligor attest the bond, and another witness who makes his mark, the Court will not receive evidence of the hand writing of the wife; but after the plaintiff had proved that there was such a witness alive about the date of the bond, and accustomed to make his mark, the hand writing of the obligor was permitted to be proved. *Nelus v. Brickell's admrs.* 1 *Hayw. Rep.* 19.

An admission in an answer in Chancery of a bill of sale on which complainant relies, supercedes the necessity of proving it at the trial. *Wright v. Wright*, 2 *Littell's Rep.* 10.

Where the subscribing witness cannot be produced, proof of his hand writing will

Chap. II. s. 4. executed ;(1) * or it appear that the name of a fictitious person Subscribing has been put as a witness by the party himself who executed the Witnesses. deed ;(2) or the person really attesting was, at the time of the

(1) *Grellier v.*

Neale, Peake
N. P. 146.
Doug. 216.
Lowe v Jol-
iffe, 1 Black.
365.

be received ; and when that cannot be had, proof of the hand writing of the obligor will be received. *Jones's adm. v. Blount's exrs.* 1 *Hayw. Rep.* 238. Vide *Irving v. Irving, 2 Do. 27.* *Cornell v. Brickley, 1 M' Cord's Rep.* 466.
As to the identity of the obligor of a bond, vide *Mushrow & Co. v. Graham, 1 Hayw. Rep.* 361.

(2) *Fanset v.*
Brown, Peake
N. P. 23.

A release must be proved by the subscribing witness, before it can be produced in evidence. *Reading v. Metcalf, Hard. Rep.* 535.

By Statute in *South Carolina* passed in *December, 1802*, proof of the hand writing of the party, in certain cases, is admissible without any notice of the subscribing witnesses. Vide *2 Bay's Rep.* 507.

If a subscribing witness recognise his hand writing, and is assured that he never subscribed without due and proper acknowledgment by the party, it is sufficient. *Pearson et al. v. Wightman, 1 Rep. Const. Ct. S. Car.* 336.

Where the witness to the bond becomes the assignee, it is not sufficient to prove the hand writing of the obligor of the witness. *Johnson ass. &c. v. Knight, 1 Murphy's Rep.* 293. *Hall v. Pym, 2 Hayw. Rep.* 328.

The subscribing witness to a note being out of the State, other evidence of it admissible, even before proving the hand writing of such witness. *Homer v. Wallis, 11 Mass. Rep.* 309.

Comparison of hands or concessions of a party on a former trial, if not attached to the record, cannot be given in evidence to prove an instrument, while the subscribing witness thereto is within the reach of the process of the Court. *Pearl v. Allen, Tyl. Rep.* 4.

The signature of a party to a release cannot be proved by comparison of hand writing, if there be a subscribing witness, even though he reside without the State. *Rich v. Trimble, 2 Tyl. Rep.* 349.

Proof of the hand writing of the obligor of a bond cannot be received, when the subscribing witnesses reside within the *U. States.* *Love v. Payton, 1 Overton's Rep.* 265.

Quero. Whether, in case the subscribing witness to a bond reside in another State, the acknowledgment and hand writing of the obligor can be received. *Hempstead v. Bird, 2 Day's Rep.* 293.

Where there were two subscribing witnesses to a deed, one of whom was proved to be dead, and the other living within the State, but too aged and infirm to attend the trial, proof of his hand writing was held inadmissible. *Jackson ex d. Bond et al. v. Root, 18 Johns. Rep.* 60.

And if out of the State, proof of their hand writing is sufficient. *Shady v. Champlin, 4 Johns. Rep.* 461.

* It is not necessary that he should actually see the party execute ; for if he be in an adjoining room, and the party, after executing the deed, bring it to him, tell him that he has done so, and desire him to subscribe his name as a witness, that is sufficient. *Park v. Meare, 2 Bos. & Pul.* 217. In *Phipps v. Packer, 1 Campb.* 412, Lord ELLENBOROUGH held that if the subscribing witness denied the execution, the party could not be permitted to give other evidence ; but the case of *Grellier v. Neale*, was not adverted to : and in two subsequent cases, viz. *Fitzgerald v. Elise*, before LAWRENCE J. and *Lemere v. Deare*, before LE BLANC J. the same rule was adopted as that laid down by Lord KENTON. Vide *Campb.* 635 and 636 ; and so the Court of Common Pleas also held in *Talbot v. Hodson, 7 Taunt.* 251. (Vide *Curtis v. Hall, 1 South. Rep.* 143.—AM. Ed.)

execution of the deed, interested in it and continues so at the time of the trial, (1) in these cases proof of the hand writing of the party will be sufficient;* (k) and if the instrument, on the

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(1) Swire v
Bell, 5 T
Rep. 371

Where the obligor and subscribing witnesses to a bond are dead, proof of the hand writing of the witness is sufficient. *Mott v. Doughty*, 1 Johns. Cas. 230.

Proof of the confession of the party signing a promissory note was received, without calling the witness. *Hall v. Phelps*, 2 Johns. Rep. 451. But in *Fox et al v. Rail et al*, 3 Johns. Rep. 477, the Court held, in the case of a bond, that the witnesses must be produced; or in case of death or out of the State, his hand writing must be proved.

Where the instrument is good without a subscribing witness, it is not necessary to prove his hand writing before the plaintiff may resort to other evidence. *Homer v. Wallis*, 11 Mass. Rep. 309.

A deed cannot be proved by the grantee without accounting for the absence of the subscribing witness. *Willoughby v. Carleton*, 9 Johns. Rep. 136.

Where A. and B. were subscribing witnesses to a deed, both of whom were dead at the time of trial, and the hand writing of A. was proved, and that he had signed the name of B. in his presence and at his request, it was held sufficient proof for the deed to go to the jury. *Jackson ex d. Boyd v. Lewis*, 18 Johns. Rep. 504.

Proof of the hand writing of the witness to an instrument, is sufficient evidence of its execution, without proving the hand writing of the party to it. *Parker's exrs. v. Fusti's exr.* 1 Har. & Johns. Rep. 387.

In *Wood v. Drury*, 1 Lord Raym. Rep. 734, it was sufficient where the witness had become blind. So in *Barnett v. Taylor*, 9 Ves. Rep. 381, where he was incompetent from insanity. Or being convicted of an infamous crime. *Jones v. Mason*, 2 Strange. Rep. 883. Or where the witness put his name without the knowledge or consent of the parties. *M' Craw v. Gentry*, 3 Camp. Rep. 292. *S. P. Holloway v. Lawrence*, 1 Ruffin. Rep. 49.—AN. ED.

* In *Cunliffe and wife, administratrix, v. Sefton*, 2 East, 183, there were two subscribing witnesses to a bond, one of whom was the administrator of the obligee and a plaintiff in the action; the plaintiff proved that diligent inquiry had been made after the other subscribing witness at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him: This was held sufficient to let in evidence of the hand writing of the other subscribing witness, who was interested as plaintiff on the record.†

† Where the witnesses to a written contract were the sons of the defendant who executed it, and the plaintiff, the day before the Court, inquired of the defendant for the witnesses in order to subpoena them, and was falsely told by the defendant that they had gone a journey, this was held not sufficient diligence to procure them. *Mills et al v. Twist*, 8 Johns. Rep. 94.

In *Cooke et al v. Woodrow*, 5 Cranch. Rep. 13, where inquiry was made for the witness at the place he was last heard of, and could not be found, evidence of his hand writing was admitted.

(k) Any deed under seal, when proved, may be given in evidence. *M' Dill's les. v. M' Dill*, 1 Dall. Rep. 63. *S. P. Shrider's les. v. Norgan*, *ibid.* 68. But in *Frukker v. Les. of Eddy*, 1 Blinn. Rep. 190, *TILGHMAN*, C. J. said, "It has been generally conceived that in these cases the law was carried too far." And by the same Judge, in *Les. of Peters et al v. Condren*, 2 Serg. & R. Rep. 83, "this decision has been considered as a slip in the hurry of business."

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A deed is not evidence, unless it be first shewn that the grantor possesses some interest, either in Law or Equity, in the matter in controversy. *ibid.* *Faulkner v. Les. of Eddy*, 1 Binn. Rep. 190. Sed contra, *Les. of Bioren v. Keep*, 1 Yeates' Rep. 440.

A deed proved to be executed by several of the grantors, though not by all of them, was ruled to be admissible in evidence. *Les. of Brown v. Long*, 1 Yeates' Rep. 162.

A deed from a defendant in ejectment to a third person, executed subsequently to the commencement of the suit, is admissible in evidence to support the credit of a witness, who had sworn that he had no interest in the land, and whose credit had been impeached. *Richardson v. Les. of Stewart*, 4 Binn. Rep. 196.

Papers purporting to be cancelled bonds, cannot be received in evidence, without proof that they once existed as bonds. *Lenox v. Dehaas et al.* 1 Yeates' Rep. 37.

To prove a lost receipt attested by a subscribing witness, he must be produced, or the omission to do so must be supplied in the same manner as if the paper were produced. *M'Mahon v. M'Grady*, 5 Serg. & R. Rep. 314.

Where one deposed that he was called into a room to witness the execution of articles of agreement, that he did not see the vendor sign, seal, or deliver the papers, but that he saw the money paid, and knew the hand writing to be that of the vendor, it was ruled sufficient proof of the vendor's signature to let the instrument go to the jury. *Leaher's les. v. Levan*, 2 Dall. Rep. 96.

A subscribing witness swore that by his minutes he found he was at a certain place on that day, and that upon reference to the warrant of attorney, he found his name in his own hand writing, as the attesting witness, that the defence to the warrant was in his own hand writing, and the impression of the seal appeared to have been taken from an engraving he then and still had; and from all the circumstances, he was convinced that he was present and witnessed the execution of the instrument; held sufficient proof for the warrant to go the jury. *Pigeot v. Holloway*, 1 Binn. Rep. 436. Et vide *Churchill v. Speight's exrs.* 2 Hayw. Rep. 338. *Denn ex d. Gaston v. Mason*, 1 Cox's Rep. 10.

The Court may decide whether a paper offered in evidence is sufficiently proved, or they may leave it to the jury to determine, directing them not to consider it of any validity, unless satisfied of the proof. *Commissioners of Berks v. Ross*, 3 Binn. Rep. 539. *M'Corkle v. Binn*, 5 Do. 348. *Bogle et al. v. Sullivan*, 1 Call's Rep. 561.

But where the issue is on the authenticity of an instrument, upon the slightest proof of its execution, the Court are bound to let it go the jury. *Berks & Dauphin Turnp. Road Comp. v. Myers*, 6 Serg. & R. Rep. 12.

What is sufficient proof of the execution of a bond, to entitle it to go to the jury. *Vide Sigfried v. Levan*, 6 Serg. & R. Rep. 308.

A deed proved by one of the subscribing witnesses to have been executed in Ireland, and certified by the Sovereign of Belfast, under the seal of the corporation, is not evidence without proof that such seal is the seal of the corporation. *Foster v. Shaw*, 7 Serg. & R. Rep. 156.

A deed under the seal of a banking corporation within this State, and duly incorporated, is not evidence, unless the seal be proved. *Leasure v. Hillegas*, 7 Serg. & R. Rep. 313. Et vide *Jackson ex d. Martin et al. v. Pratt*, 10 Johns. Rep. 381.

An instrument which is denied must be proved before it is sent to the jury. *Nell v. Miller*, 2 Root. Rep. 117. *Canfield v. Squire*, *ibid.* 300.

Where a deed was duly executed and acknowledged, but retained by the grantor with the consent of the grantee, by way of security, until the consideration money

is strong evidence for a jury to presume that the other formal- Chap. II. s. 4.
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was paid, the grantor died, having devised the premises, and the deed was found among his papers, it was held there was no actual delivery to, or acceptance of, the deed by the grantee, and therefore nothing passed by it. *Jackson ex d. M'Crear v. Dunlap*, 1 Johns. Cas. 114.

But in the case of a release, the Court said a formal delivery was not necessary, if there be any act evincing such intention. *Goodrich v. Walker*, *ibid.* 250.

In *North Carolina*, an action of debt was brought on a sealed instrument without any subscribing witness, the party was allowed to prove the hand writing of the obligor, and the Court decided that attestation was not necessary to prove the validity of a deed. *Ingram v. Hall*, 1 Hayw. Rep. 123.

But where a sealed instrument was executed by two, and there appeared to be an attesting witness, and proof was offered that one of the obligors acknowledged the execution by both, this was held insufficient. *Clements & Co. v. Eason et al.* *ibid.* 18. *Fox et al. v. Rail et al.* 3 Johns. Rep. 470.

In *Milward v. Temple*, 1 Camp. Rep. 375, an action of debt on bond, the witness's hand writing being acknowledged, Lord ELLENBOROUGH said that it might be taken as a presumptive admission of all he professed to attest and would have been called to prove.

Where the father of defendant, after executing a deed, left it on the table, where it remained all night, and in the morning took it up and put it away, it was held, that though it was probable he signed it, yet there was no evidence of a delivery. *Ward's exrs. v. Ward*, 2 Hayw. Rep. 226.

In an action on a single bill, the subscribing witness swore that his name subscribed thereto was in his own hand writing, and that he attested a note from A. to B. who assigned to the plaintiff, and that he attested no other, that he did not believe the signature to the note to be in A.'s hand writing, nor did he remember that there was a seal to it: these circumstances were left to the jury to determine whether sufficient evidence. *Churchill v. Speight's exrs.* 2 Hayw. Rep. 338.

Where circumstances are proved, which could not have existed unless the principal fact also existed, such circumstances are proofs of the principal fact. *ibid.*

A *cuius que trust* can only be barred by barring the estate of the trustees. *Cholmondeley v. Clinton*, 2 Merivale's Rep. 258.

Proof of a deed by a surviving grantor in 1750, who proved that the other grantors were dead, was held sufficient, it being an ancient deed and prior to the Act of 1771 relative to the proof of deeds. *Jackson ex d. Hardenberg et al. v. Schoonmaker*, 2 Johns. Rep. 230.

Where the hand writing of two of the witnesses to a will was proved, and the third had signed the initials of his name, and the testator had made his mark, on the trial in 1806 a witness swore that he saw one of the witnesses to the will make his mark, and from a comparison of the two, he believed the mark to the will was affixed by the witness to it, and proof of one of the other witnesses having declared the will was duly executed, these circumstances were held sufficient evidence of the execution of the will, where accompanied with evidence of possession by the devisees under the will. *Jackson ex d. Van Dusen v. Van Dusen*, 5 Johns. Rep. 144.

In a special verdict in ejectment, the jury having found twenty years' possession in the plaintiff, and that one of the title deeds was not indented and expressed no consideration, is not sufficient to prevent a judgment in his favour. *Kinney v. Beverly*, 2 H. & Munf. Rep. 318.

A deed sixty-three years old, unaccompanied by possession, was admitted in evidence, upon proof of one who had known one of the witnesses, had seen many deeds and papers signed by him, and from them believed his name to the deed to be his

Chap. II. s. 4. ties were complied with.(1). It has, indeed, been said in one book of great authority,(1) and repeated in another of more modern date, that "though the deed be produced under hand and

(1) Gribb. Law
Ev. 101.

Bul. N.P. 254.

"seal, and the hand of the party be proved, yet that is no full "proof of the deed, for the delivery is necessary to the essence "of the deed, and there is no proof of the delivery but by a witness who saw it;" but I conceive that the authority of this *dictum*, supposing it to extend to a case where there is no subscribing witness, is destroyed by subsequent decisions. At the time when writing was but little practised among men, and when contracts were authenticated by seals only, it might be proper to insist on having some person who was present at the execution; for seals might be so easily counterfeited, or affixed by any person, that it was requisite Courts of Justice should be particularly careful in receiving evidence of them; but the characters of hand writing are in general so distinguishable from each other, that they cannot easily be mistaken.(m)

(2) 19 Vin.
Evidence,
(T. b.) 48,
pl. 12.

When the subscribing witness is dead, insane,(2) or absent in a foreign country,(3) at the time of the trial, whether for a per-

(3) Coghlan v.
Williamson,
Doug. 93.
Holmes v.
Pontin, Peake
9 Mass. Rep. 307.
N. P. 99.
Barnes v.
Trompowsky,
7 T. Rep. 965.
Adams v.
Kerr, 1 Bos.
& Pul. 360.

hand writing, though he never had seen the witness writes. *Thomas's les. v. Herlocker*, 1 Dall. Rep. 14.—AM. Ed.

(1) The delivery is an essential requisite to a deed. *Hatch et al. v. Hatch et al.* 10 Do. 456. *Maynard v. Maynard et al.* 10 Do. 456. *Harrison et al. v. Trustees of Phillips' Academy*, 12 Do. 456.

But it is not essential to the valid delivery of a deed that the grantee be present, and that it be made to or accepted by him personally at the time. *ibid.* Et vide *Goodrich v. Walker*, 1 Johns. Cas. 250. *Belden et al. v. Carter*, 4 Day's Rep. 66. *Verplank et al. v. Sterry et ux.* 12 Johns. Rep. 536. *Ruggles v. Lawson et al.* 13 Do. 285.

Possession by the grantee or his heirs of an ancient deed is evidence of delivery. *Mallory v. Aspinwall*, 2 Day's Rep. 280. *Souwerbye et ux. v. Arden et al.* 1 Johns. Ch. Cas. 240.

The Chancellor, in the case of *Souwerbye et ux. v. Arden et al.* 1 Johns. Ch. Rep. 240, says "the general principle of law is, that the formal signing, sealing, and delivery is the perfection and consummation of the deed, and it lies with the grantor to prove clearly that the appearances were not consistent with the truth."

Et vide *The Trustees of the Methodist Episcopal Church et al. v. Jacques et al.* *ibid.* 450.

Delivery of a release. Vide *Fitch et al. v. Forman*, 14 Johns. Rep. 172.

Sealing and delivery is all that is essential to a good deed, and on proof of the hand writing of the obligor, the jury may presume the sealing and delivery. *Long v. Ramsey*, 1 Serg. & R. Rep. 72.

(m) A written or ink seal is good. *M'Dill's les. v. M'Dill*, 1 Dall. Rep. 63. *Alexander et al. v. Jamieson et al.* 5 Binn. Rep. 238. *Long v. Ramsey exr.* 1 Serg. & R. Rep. 72. *Jones et al. v. Logwood*, 1 Wash. Rep. 48. But in *Baird et al. v. Blagrove*, *ibid.* 170, it was said there must be some expression in the deed to give it that effect. *Austin's admx. v. Whitlock's exrs.* 1 Munf. Rep. 487. Et vide *Newbold's exrs. v. Lumb*, 2 South. Rep. 449. But in the case of *Overseers*

manent residence or temporary purpose(1) (n) * or by the commission of some crime,(2) or the accrual of some interest,(3) subsequent to the execution of the instrument, he has become an incompetent witness; proof of his hand writing is the next best evidence which can be given.(o) In the first case, viz. where he is dead, this alone has been held to be sufficient; but in the others, it has been usual, and in one case was held to be necessary,† to prove the hand writing of the party to the deed also; and, in all these cases, a foundation must first be laid, by proving the situation in which the witness stands.

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(1) Prince v. Blackburn, 2 East. 250.

(2) Jones v. Mason, 2 Stra. 833.

(3) Goss v. Tracy, 1 P. Wil. 289.
Godfrey v. Norris, 1 Stra. 34.

(4) Vide Wallis v. Delancey, 7 T. Rep. 266, note (c.)
Gilb. Law Ev. 105.

of *Hopewell v. Overseers of Amwell*, 1 Halst. Rep. 169, it was decided not to be good except upon instruments for the payment of money, under the Statute of New Jersey.

If by the laws and usages of a country, an L. S. in ink be used to instruments instead of seals, such instruments may be declared on as sealed instruments. *Meredith v. Ebnudale*, 2 Caines' Rep. 361. See vide contra, *Warren v. Lynch*, 5 Johns. Rep. 237.—AM. ED.

(n) In an action on a promissory note, to which there is a subscribing witness who had become insane, held that proof of his hand writing was sufficient to prove the making of it. *Currier v. Child*, 3 Camp. Rep. 283. Vide *Nelson v. Whittall*, 1 Barn. & Ald. Rep. 18.—AM. ED.

* Now by Stat. 26 Geo. 3, c. 57, s. 58, deeds executed in the *East Indies*, and attested by persons resident there, may be proved by evidence of the hand writing of the obligor and witnesses, and that the witnesses are resident there: and the like proof is made sufficient evidence in the *East Indies* of any deed executed in *Great Britain*. In *Crosby v. Percy*, 1 Taunt. 364, the Court of Com. Pleas went still further, and held that even where the witness had absconded to avoid his creditors, and could not, after fair and diligent inquiry, be found, the proof of his hand writing was sufficient. MANSFIELD, C. J. said the law had been relaxed in the course of his practice, and the balance of convenience was in favour of the extension, and that more inconvenience resulted from excluding the secondary evidence than from admitting it; and the same rule was adopted by Lord ELLENBOROUGH in the case of *Wardle v. Fernor*, 2 Campb. 282, where the subscribing witness had absconded from a commission of bankruptcy taken out against him. So where a man was serving on board the navy, proof of his appearing by the Admiralty books to be on board a ship then at sea, and his mother also being called to prove his identity, was held sufficient to let in evidence of his hand writing. *Parker v. Hoskins*, 2 Taunt. 223.

(o) Vide the case in 1 *Phillimore's Rep.* 280.—AM. ED.

† In the case of *Adams v. Kerr*, 1 Bos. & Pul. 360, where a bond was executed abroad, one witness was dead, and the other resident abroad, proof of the hand writing of the deceased witness was held sufficient, without proof of the hand writing of the other, or the obligee. But in *Wallis v. Delancey*, where a bond was executed at *New York* in the presence of two witnesses, and the hand writing of one who was abroad was proved, Lord KENTON held that evidence should be given of the hand writing of the obligor also, which was given accordingly; and it being objected that the hand writing of *Morton*, the other subscribing witness, should be proved, and that he was abroad or dead, his Lordship thought that some evidence of that sort was necessary. Whereupon the plaintiff proved that there had been a man of the name of *Morton*, who had lived as clerk with the other subscribing witness, but

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It frequently happens, that there are more than one witness to a deed, and in the case of a will of lands, the Statute of Frauds expressly requires three witnesses; nevertheless, in these cases, it is sufficient if one be called; but if they are all dead, the deaths of all should be proved before evidence is received of the hand writing of either, for until it appears that neither of them is living, the other is not the best evidence which the nature of the case will admit of.

But it may be asked, how is the hand writing of a man to be proved, where no one saw him write his name to the instrument, which is to be produced in evidence? In this case, it is plain that no positive or direct evidence of the fact can be given, and therefore the law still adhering to its general rule, that the best evidence *the nature of the case will admit of* is sufficient, is satisfied with circumstantial and presumptive evidence. The hand writing of every man has something peculiar and distinct from that of every other man, and is easily known by those who have been accustomed to see it, and therefore the *belief* of such persons is always received as presumptive evidence of the fact, either in civil or criminal(1) cases. But the person who speaks to that belief, must have such a knowledge as enables him to form it, such as having seen the party write, or having received letters from him in a course of correspondence;(2) barely having seen letters purporting to be franked by him,(3) or other papers, which he has no authentic information are of the party's hand writing, is not sufficient.

(1) Dr. Hen-
 sey's case,
 1 Burr. 642.

(2) Gould v.
 Jones,
 1 Black. 384.

(3) Cary v.
 Pitt, esq.
 K. B. Sittings
 at Westm.
 after Easter
 Term,
 37 Geo. 3.
 Append.

(4) Decosta v.
 Pym. Append

In forming this belief, the witness ought, in civil cases, to speak solely from the impression which the hand writing itself makes upon his mind, without taking into his consideration any extrinsic circumstance; and therefore in a case(4) where a witness said that he should, looking at the hand writing, think it

his christian name, or hand writing, or what was become of him, was not proved; and on objection that he might, for aught appearing to the contrary, be alive and in England, Lord KENYON held the evidence to be sufficient, for this being a foreign transaction, though perhaps the evidence was capable of being more perfect, yet it was sufficient and reasonable evidence to go to the jury at least, unless rebutted by some evidence on the other side. But in *Cunliffe v. Sefton*, ante. 149, and *Prince v. Blackburn*, 2 East. 250, where the witness was abroad at the time of the trial, proof of the hand writing of the witness interested in the one case, and absent in the other, was considered to be sufficient, and the plaintiff was not called upon to prove the hand writing of the obligor; so that it seems the *N. P.* case of *Wallis v. Delancey*, and the Act of Parliament, as to proof of deeds executed in the *East Indies* (which passed before it was clearly settled that the hand writing of the subscribing witness might in such cases be proved,) are the only authorities which shew that evidence of the hand writing of the obligor is necessary.

was that of the party whose name it bore, but that from his knowledge of him he thought he could not have signed such a paper, it was held that this was *prima facie* evidence of the hand writing; and on the same principle, where it was contended, that the paper produced was the forgery of a third person, evidence that such third person had forged the defendant's name to other instruments of a similar nature, was held not to be admissible.⁽¹⁾*

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The process by which the mind arrives at the belief of hand writing, being the recollection of the *general character* from an acquaintance, by frequently seeing it, and not from the formation of *particular letters*, or a single inspection, Courts of Justice have wisely rejected all evidence from mere *comparison of hands* unsupported by other circumstances; they will not, therefore, permit two papers, one of which is proved to be the hand writing of a party, to be delivered to a jury for the purpose of comparing them together, and thence inferring that the other is also of his hand writing. But in cases where the antiquity of the writing makes it impossible for any person to prove it, from having actually seen the person write, and where the instrument acquires a degree of authority from the place in which it is found, the evidence of a man who has had opportunities of making himself acquainted with the *character*, by frequent inspection, has been admitted: and therefore, where a parson's book was produced to prove a *modus*, he having been long dead, a witness who had examined the parish books, in which his name was written, was permitted to swear to the similitude; for it was the best evidence the thing was capable of. And in some later cases, ancient documents, coming out of the proper custody, have been inspected in Court, for the purpose of shewing

(1) *Baleotti v. Serani*, Peake N. P. 143.
Graft v. Lord Brownlow Bertie.

Masferson v. Thoytes, Peake N. P. 20.

Brookhard v. Woodley, ib. note (a.)

Per Hard. C. 6 Dec. 1746, Bal. N. P.

* *Graft v. Lord Brownlow Bertie*, administrator of *Lady Mary Greathead*, *Sittings at Westm. after Trin. 1777*, M. S. Debt on bond, plea *non est factum*. The bond was attested by *Dadley* only, and he being dead, his hand writing proved. For the defendant, it was offered to prove, that other bonds attested by *Dadley* were forged, which bonds were produced; but Mr. *Dunning*, for the plaintiff, strongly objected to this evidence, because plaintiff could not be prepared to support the authority of other deeds. Lord *Mansfield*.—*Dadley's* hand is proved as evidence of all he would have said if living, and if he had been here, they might have produced other bonds, and asked whether they were his signature, and whether he saw the bonds executed; and if he had said yes, they might have called other witnesses to prove that they were not given. Lord *Mansfield*, at last, rejected the evidence, with liberty for the defendant to move the Court; but the jury, on evidence that was given, found a verdict for the defendant. *Quere*, Would not the proper evidence in this case have been the *general character of Dadley*; and that the persons acquainted with it would not have believed him on his oath? Vide post.

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- that the paper in question is of the same hand writing.(1) In one case the receipt of a former rector, dated forty years before, for a money payment in lieu of tithes, given to a person of the same name as the defendant, residing at the same place, and coming out of the custody of the defendant, was permitted to be read, though there was no distinct evidence of the hand writing of the rector, of the degree of relationship between the defendant and the person to whom the receipt was given ;(2) but in another case, a paper writing, purporting to be a receipt of more than fifty years old, was by three barons (dissent. Wood) considered as inadmissible, until proof was given of the hand writing, or of the death of the party, and the relative situation of the parties to the rector.(3)
- (1) *Morewood v. Wood*, cited 14 East, 327. And *Roe dem. Bruner v. Rawlins*, 7 East, 279. And post, Appendix.
- (2) *Bertie v. Beaumont*, 2 Price, 307.
- (3) *Manby v. Curtis*, Price, 225. Where witnesses have been called to prove the similitude of hand writing, and other witnesses have, from the same premises, drawn a different conclusion, it has, in some cases,(4) before a jury whose habits of life have accustomed them to the sight of hand writing, been permitted to hand up other papers confessedly written by the party for them to inspect and compare them together ; this mode of proceeding, however, seems rather a departure from the strict rules of evidence, and before an illiterate jury would probably not be adopted.
- (4) *Allesbrook v. Roach*, K. B. Sittings at Westmin. after Trin. Tm. 1795, M. S. 1 Esp. Cas. 815, S. C. *Da Costa v. Pym*, Appendix.
- In one case(5) which came before the Court, the party who contended that the hand writing was a forgery, was permitted, after a great deal of other evidence, to examine a clerk at the post-office, whose business it was to inspect franks and detect forgeries, to prove that from the appearance of the hand writing, it was, in his opinion, a forgery, and not a genuine hand writing ; but, in a subsequent case,(6) Lord KENYON said that such evidence was wholly inadmissible ; and observed, that though in *Revet v. Braham* it was admitted, yet that in his direction to the jury, he had laid no stress at all upon it.
- (5) *Goodtitle dem. Revet v. Braham*, 4 T. Rep. 497.
- (6) *Cary v. Pitt*, supra.

The analogies of law, however, appear strongly to support the admissibility of this evidence ; for opinion, founded on observation and experience, is received in most questions of a similar nature. There is a certain freedom of character in that which is original, which imitation seldom attains, and the want of that freedom is more likely to be detected by one whose attention has been directed to the subject, than by another who has never given his mind to such pursuits. It does, therefore, seem rather too much to say, that such evidence is in all cases inadmissible, though it certainly ought to be received with great caution, and meet with little attention, unless as corroborating other and stronger evidence.

The true distinction seems to have been taken by Mr. Baron Chap. II. s. 4. HOTHAM, on the trial of the *King v. Calor*,⁽¹⁾ where the defendant Proof of Hand writing. being indicted for publishing a written libel, and a person from the post-office who had never seen him write, being called as a witness, that learned Judge permitted the witness to give *general evidence*, that the writing appeared to be in a feigned hand; but when the witness was asked, whether, on comparing such hand writing with papers proved by others to be the genuine hand writing of the defendant, he could say it was the disguised hand of the same person, his Lordship rejected the evidence attempted to be introduced by such examination; because it arose only from comparison of hands. We may, therefore, I think, still consider the case of *Revet v. Braham*, as an existing authority to shew, that for the purpose of proving generally and in the abstract, that a hand writing is *not genuine*, such evidence is *admissible*, though, as I said before, deserving of little attention; for the want of freedom in the hand writing, and the painting of the letters, as it was called by the witness in that case, may arise from the infirmity of the writer, his not having formed a fixed character; or many other causes which a person, unacquainted with the genuine hand writing, cannot take into his consideration. A tradesman who is daily making entries in his books, will acquire a more free and steady character, than an illiterate person who can but just write his name; and a man, whose habits of life lead him to write much oftener and with less care, will get still more of a peculiar *character* in his hand writing; all which circumstances should certainly be taken into the consideration of a jury before they give weight to such evidence.^(p)

(p) The hand writing of the maker and endorser of a note may be proved by witnesses from their previous knowledge of his hand writing, derived from having seen the person write, or from authentic papers received in the course of business; but if the witness has no previous knowledge of the hand writing, he cannot be permitted to decide upon it from comparison of hands. *Titford v. Knott*, 2 Johns. Cas. 211. *S. P. Jackson ex. d. Van. Deusen et al. v. Van Dusen*, 5 Johns. Rep. 144.

Quere, Whether papers signed by the party, and admitted to be genuine, can be delivered to the jury, to determine by comparison as to the genuineness of the paper in question. *ibid.* 2 Johns. Cas. 211. *Olmsted v. Stewart*, 13 Johns. Rep. 238.

The confidential clerk of the plaintiff was admitted to prove a correspondence, by letters, between the plaintiff and defendant, who resided in London, and to testify that from the knowledge he had acquired from the letters of the defendant received during this correspondence, he believed the endorsement in question to be the hand writing of the defendant, though he had never seen the defendant write. *Titford v. Knott*, 2 Johns. Cas. 211. *The State v. Allen*, 1 Ruffin. Rep. 6.

Comparison of hands not admissible as subsidiary testimony, upon the clashing of parol proof. *Haskins v. Stuyvesant*, Anth. N. P. 91.

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In the beginning of the present section, I had occasion to observe, that where an original instrument was in the hands of the party, against whom it was intended to be given in evi-

The hand writing of a person long since deceased, may be proved by comparison. *ibid.* 98, n. a.

The hand writing of a surveyor to an ancient survey, may be proved by a witness who has become acquainted with such surveyor's writing by inspecting ancient surveys avowedly made by him. *Jackson v. Murray, ibid.* 77.

After the hand writing of a party is in evidence, his hand writing to any other instrument may be proved by calling a witness to compare it with that to be proved, and state his inference to the jury. *Roger's adms. v. Shaler, ibid.* 79. Et vide *Homer v. Wallis*, 11 *Mass. Rep.* 309. *Hall et al. v. Huse*, 10 *Do.* 39.

On an indictment for altering a forged bank note, it is not necessary to prove the forgery by the president and cashier, whose names are on the note; a witness who has become acquainted with their hand writing in the course of an official correspondence, is sufficient. *Commonwealth v. Smith*, 6 *Serg. & R. Rep.* 568.

The hand writing of a party to a receipt, may be proved by a witness who has never seen him write, but who in the course of his dealings with him has received his promissory notes, which the party has paid, if the witness swears from the knowledge derived from these facts, that he believed the signature to the paper produced, to be the proper hand writing of the party. *Johnson v. Davenport*, 19 *Johns. Rep.* 134.

Where a witness called to prove the hand writing of a subscribing witness to a codicil, could not undertake to say, that he had ever seen the subscribing witness write, but that from his having been a *notary public*, he had seen much of his acknowledged writing, it was held sufficient. *Duncan v. Beard*, 2 *Nott & M'Cord's Rep.* 400.

It is sufficient proof of defendant's signature, if a witness swear that he has seen him write, and that he believes it to be his hand writing. *Commissioners of Poor v. Hanson*, 1 *Nott & M'Cord's Rep.* 554.

The comparison of hands will not be admitted where the subscribing witness can be obtained. *Pearl v. Allen*, 1 *Tyl. Rep.* 4.

Upon an indictment for stealing a bank note, bill, &c. parol evidence may be given of the contents of the instrument, without a previous notice to the defendant to produce it. *Commonwealth v. Messenger et al.* 1 *Binn. Rep.* 273.

But in cases of *forgery and passing counterfeit notes*, the law seems otherwise. *State v. Osbourn*, 1 *Root's Rep.* 152. *State v. Blodget, ibid.* 534.

Where the question was, whether the alteration in a will were made by the original draftsman, or by a stranger, evidence of other writings proved by witnesses, and also of witnesses, is admissible to shew that the peculiarities of the alteration are such, as the party frequently used in his ordinary and genuine hand writing. *Smith v. Fenner*, 1 *Galls. Rep.* 170.

Hand writing cannot be proved by comparison of hands. *Martin v. Taylor*, C. C. April, 1803, *M. S. Rep.* *United States v. Johns, ibid.* April, 1806.

But after evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with other writing, concerning which there is no doubt. *M'Corkle v. Binn*, 5 *Binn. Rep.* 349.

Comparison of hands, or proof by witnesses acquainted with the hand writing, may be left to the jury, on an indictment for forgery, especially where the writing is found in the possession of the prisoner. *Pennsylvania v. M'Kee*, *Addis. Rep.* 33. Et vide *State v. Brunson*, 1 *Root's Rep.* 307.

An ancient deed which had not accompanied possession, was allowed on the evidence of a person who swore that he had well known one of the witnesses to it,

dence, no evidence whatever of its contents could be received, until notice had been given to produce it.^(q) This notice may be delivered either to the party or his attorney, even in an information or penal action.⁽¹⁾ ^(r) And if a lessee give a formal notice to his lessor of his intention to do any act according to the terms of the lease, and the lessor afterwards assign the reversion, it is sufficient, when a dispute arises between the lessor and the assignee of the reversion, to give notice to the latter to produce such formal notice, without applying to the original lessor, for it will be presumed that he delivered it to his assignee as a document relating to the estate.⁽²⁾

A letter informing a man of the dishonour of a bill, or the like, cannot be proved until a similar notice has been given.⁽³⁾ ^(s) This rule is founded on the wisest principles of justice, for the party in whose hands the papers were, not deeming them necessary for his own case, might not otherwise bring them with him; but the rule being adopted for the purpose of preventing a misrepresentation of any of the facts which form the foundation of the action, it follows that any written paper delivered to a party after it is commenced, or for the mere purpose of a for-

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(1) Attorney
General v.
Le Merchant,
2 T. Rep. 201,
note (a) Cates
v. Winter, 3
T. Rep. 306.

(2) Goodtitle
dem. Lux-
more v. Sa-
ville, 16 East,
87.

(3) Shaw v.
Markham,
Peake's N. P.
165.
Langdon v.
Hull, 5 Esp.
Cas. 156,
accord.

and had seen many deeds and papers signed by him, and believed it to be his hand writing, though he never had seen him write. *Thomas's les. v. Horlocker*, 1 Dall. Rep. 14.

On the same principle, that comparison of hands is sometimes admitted, the jury may be permitted to compare the types, devices, &c. of newspapers, a foundation being first laid. *M^cCorkle v. Binns*, 5 Binn. Rep. 340.—AM. ED.

(q) Ante, p. 140.—AM. ED.

(r) The delivery of an original at a house where the defendant was said, in the directory of the current year, to reside, is sufficient to authorise the reading of a copy of a letter to a jury, notice having been given to produce the original. *Hazard v. Van Amringe*, 4 Binn. Rep. 295. n.—AM. ED.

LETTERS, &c.

(s) Letters written by a party, are not admissible in evidence in his favour, though they are against him. *Twiss et al. v. Stevenson*, 1 Johns. Cas. 110.

Cotemporaneous correspondence of a public agent abroad with his government, is evidence for him in an action brought on account of the subject stated in it. *Bingham v. Cabbot*, 3 Dall. Rep. 319. Vide *Smith v. Carrington*, 4 Cranch's Rep. 62.

The certificate of the Governor of a foreign island, registered in the Admiralty of Martinique, relative to an order issued by him, is evidence for the jury. *Bingham v. Cabbot*, 3 Dall. Rep. 319.

In mercantile transactions, the plaintiffs' instructions to their captain, may be given in evidence. *M^cClenachan v. M^cCarty*, 2 Dall. Rep. 51.

A bill of lading not signed, but kept by the captain for his own use, is no evidence to shew that goods were shipped, and a bill of lading signed. *Wood v. Roach et al.* 1 Yeates' Rep. 177. S. C. 2 Dall. Rep. 180.—AM. ED.

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Jory v. Or-
chard, 2 Bos.
& Pull. 39.

Anderson v.
May, Ibid.
237.

Cowen v.
Abrahams,
1 Esp. N. P.
Cas. 50.

(1) Bueher v.
Jarret, 3 Bos.
& Pull. 143.
How v. Hall,
14 East, 274.

mal notice previous to its commencement, and of which a copy is kept is not within it; it being a general rule that no notice is necessary to produce another notice, otherwise it might be extended *ad infinitum*; and, indeed, in the cases of notices given to a tenant to quit, to a magistrate, previous to the commencement of an action against him, a demand in writing of a warrant, made previous to the commencement of an action against an officer, or the like, where a copy signed by the same person who signed that delivered to the party is kept by a witness, each copy is considered as a duplicate original.^(t) The case of an attorney's bill, delivered under the Statute, is similar in principle, and may, where a duplicate has been kept, be proved in like manner without notice to produce that delivered. In one case indeed, where trover was brought for a bill of exchange, it was held by Lord KENYON, that notice to produce the original, before evidence of its contents was admissible; but this has since been properly overruled, as the form of the action itself gives the defendant sufficient notice to be prepared to produce the instrument.⁽¹⁾ (u)

(t) A notice may be proved by parol, or by producing a copy made at the time of making the original, and it is not necessary that notice to produce the original should be given. *Johnson v. Haight et al.* 13 Johns. Rep. 470.

If the party has not preserved a copy of a notice left with the opposite party, its contents may be proved by parol evidence. *Twyser v. Wilson*, 3 Caines' Rep. 174. *Col. & Caines' Cas.* 494.

That a deposition was taken according to notice, may be shewn by parol testimony. *Waters v. Brown*, 3 Marsh. Rep. 558.—A.M. Eo.

(u) Where the paper on which the action is founded, is in the possession of the opposite party, and he has given no notice to produce it, the contents cannot be given in evidence. *Dobbin v. Watkins*, *Coleman's Cas.* 39. *Waring v. Warren*, 1 Johns. Rep. 340. *Rogers et al. v. Van Hoesen et al.* 12 Johns. Rep. 221. *Kimble v. Joslin*, *Overton's Rep.* 380. *Rose v. Bruce*, 1 Day's Rep. 103.

Where notice has been given to produce a deed which there was strong presumption had either been destroyed or in the possession of the opposite party, he was allowed to give parol evidence of it. *Jackson ex. d. Gillespie et al. v. Woolsey*, 11 Johns. Rep. 446.

In *Smaltwood v. Mitchell*, 2 Hawy. Rep. 145, it was held, that the necessity of proving notice was not dispensed with, by shewing that the deed had been lost while in the hands of a person who had possession of it, for the opposite party.

In an action of trespass for entering the plaintiff's office, and carrying away a bill of lading, &c. evidence may be given of the contents of such bill, without notice to produce it. *Gilmere v. Wale*, 1 Anth. N. P. Cas. 41.

In *Wood v. Strickland*, 2 Merivale's Rep. 464, it was held, that when from the nature of the proceedings, the party must know that the contents of a written instrument in his possession, will come in question, it is not necessary to give any notice for its production.

In trover for promissory notes, the plaintiff may give parol evidence of their

It has been held in several cases, (1) that if the party to whom notice has been given to produce an instrument, produce it accordingly, the other party is entitled to read it, without further evidence of its execution. As against the party to it, there seems to be no great objection to this rule; for he must know whether he ever executed such an instrument or not, and the plaintiff not knowing who were the subscribing witnesses, cannot come prepared to prove the execution. In one case, (2) this rule was extended to third persons, into whose hands a deed had been delivered: and it was held, that an indenture of apprenticeship having come into the hands of the officers of a parish who were no parties to it, and they producing it under a notice, that no evidence was necessary to prove the execution; but the propriety of this decision has been doubted by very high authority. For in a subsequent case, where a similar point came before the Court, Lord KENYON said it was too important a question to be discussed in a session's case, where the opinion of a Court of error could not be taken, and that nothing but a solemn judgment of the House of Lords should ever persuade him that this decision was right.

Another case afterwards occurred, in which the rule was denied altogether; and the plaintiff having, in consequence of notice from the defendant, produced a deed to which he was himself a party, whereby it would have appeared he had no interest in the insurance which formed the subject of that cause; and it appearing, on inspection of the deed, that there were subscribing witnesses to it, the defendant was not permitted to read it, though he had no previous knowledge who the subscribing witnesses were; but in a still later case the general doctrine laid down in

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produced un-
der notice.

(1) Thompson v. Jones,
cited 2 T.
Rep. 43.
Passel v. God-
sall, Ibid. 44.
Vide 2 T.
Rep. 43.

(2) Rex v. In-
habitants of
Middlezoy,
2 T. Rep. 41.

Rex. v. In-
habitants of
Dolton, Mich.
41 Geo. 3.

Gordon v. Se-
cretan, 3 East,
548.

Pearce v.
Hooper, 3
Taunt. 62.

amount, without giving defendant notice to produce them. *M Clean v. Hertzog*, 6 Serg. & R. Rep. 154.

Where the form of action or pleadings gives the party notice to be prepared to produce a writing, if necessary, no other notice is requisite. *Hardin v. Kretzinger*, 17 Johns. Rep. 293.

Where a person had given a note, against which the Statute of Limitations had run, and upon its being presented for payment, seized it, saying, "I am glad I have got it in my hands," in an action on this note, (the plaintiff may give evidence of its contents, without notice to the defendant to produce it. *Gray's exr. v. Kernahan*, 2 Rep. Const. Court, S. Car. 65.

Parol testimony of a deed or will in the possession of the plaintiff, and disclosed in the cross examination of his witness, cannot be received without notice to produce it. *Jackson ex. d. Van Slyck v. Son*, 2 Caines' Rep. 178.

Where shipping articles are in the Court of Admiralty, on account of the ship's capture, after notice to defendant to produce them by plaintiff, he may give parol evidence of their contents. *Patton's adms. v. Park*, Anth. N. P. Obs. 18.—Am. Ed.

Chap. II. s. 4. this case was in some measure restrained, and the plaintiff having under notice from the defendant, produced the conveyance to himself of the estate of which he contended the land in dispute was a parcel, and to which deed he was an executing party, it was held that it was not necessary for the defendant to call the subscribing witness. In cases of this description, a Judge would probably make an order on the inspection of the deed, to give the defendant an opportunity of informing himself whether there were subscribing witnesses or not. (x)

There are some instances in which the law permits instruments to be read in evidence without proof of the execution. In most cases it would be absolutely impossible, after a great length of time, to prove the execution of a deed, or even the hand writing of the parties. It is necessary that a period of limitation should be fixed, otherwise new questions would daily arise, and therefore Courts of Justice have laid it down as a rule, that a deed of above thirty years standing, requires no further proof of its execution than the bare production, provided the possession has been according to the provisions of the deed, and there is no apparent erasure, or alteration on the face of it; and livery of seisin, though not endorsed on a feoffment, will, after such a lapse of time, be also presumed. (1)(y) In like manner, if a bond of that

(1) Bul. N. P. 255.
Ibid. 256.
Vide 12 Vin. Abr. Evid. pl. 11, where presumed after 25 years.

(x) In suits upon policies of insurance, the Court will order the assured, upon affidavit made, to produce all letters, &c. or copies relative to the matters in issue. *Lawrence v. The Ocean Ins. Co.* 11 Johns. Rep. 245. And on their production, the insured are entitled to have the whole read, it being analogous to an answer in Chancery, when given in evidence in a Court of Law. 1 Peters' Rep. 22.

If deeds are on record, the Federal Court will not grant a rule on the party in whose possession the originals are, to produce them, unless a special reason be assigned. *Geyger les. v. Geyger*, C. C. 2 Dall. Rep. 332.

No notice to produce deeds is necessary, where the defendant was not a party to the deeds, in order to entitle the plaintiff to prove their contents. *Edgar's les. v. Robinson et al.* 4 Dall. Rep. 132. But in *Little et al. v. Les. of Delancey*, 5 Binn. Rep. 271. 273, TILGHMAN C. J. and YEATES J. say, that there must have been some peculiar circumstances in the case which do not appear, under which it might have been proper to admit parol evidence.

When a party to a suit, pursuant to a notice for that purpose, produces an instrument to which he is a party, and under which he claims a beneficial interest, it is not necessary for the other party to prove its execution. *Jackson es. d. Stewart v. Kingsley*, 17 Johns. Rep. 158. *SERNOCK* C. J. said it was immaterial whether the party who calls for the deed be a party or stranger to it. Vide *Betts v. Badger*, 12 Johns. Rep. 223.—AN. ED.

(y) A Sheriff's deed, which has never been acknowledged, may be received after a great lapse of time, during which no objection was made by the debtor. *Les. of Moorhead v. Pearce*, 2 Yeates' Rep. 456.

In an ejectment, a Sheriff's deed which did not recite the record, was allowed in evidence, twenty years possession having gone with it. *Broske's les. v. Ryan*, 1 Dall. Rep. 94.

date be found amongst the papers of an intestate,(1) or public company,(2) the same presumption arises in its favour from the

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Proof of a deed by a surviving grantor in 1750, who swore that the other grantors were dead, and had executed the deed, was held sufficient, it being an ancient deed, and prior to the Act of 1771. *Jackson ex. d. Hardenberg et al. v. Schoonmaker*, 2 Johns. Rep. 230. (1) Forbes, Ad. v. Whale, Guildhall, Sitt. after Mich. T. 1764.

A will executed in 1725, and proved in 1733 and 1744, and recorded, but not accord- ing to law, was allowed in evidence in an ejectment in 1801, though actual posses- sion did not follow it, that being explained by the peculiar situation of the property and other circumstances. *Jackson ex d. Lewis et al. v. Laroway*, 3 Johns. Cas. 283.

A will thirty years old from the death of the testator, may be read in evidence. *Jackson ex. d. Bursham v. Blunsham*, 3 Johns. Rep. 289. (2) Governor & Co. of Chelsea Wa- ter Works v. Cowper, K. B. Sitts. after Hil. Tm. 1795, 1 Esp. 275, 8. C.

Where the witnesses to a will are all dead, and one of them had signed the initials of his name, as his mark, and the testator had also signed his mark, and the hand writing of two of the witnesses was proved, and a witness at the trial in 1807, swore that he had seen the other witness make his mark in 1760, to a paper then in his possession, and that, from the comparison of the two marks, and from the peculiar manner in which one of the initial letters was made, he believed the mark affixed to the will was made by the witness to it; this was held sufficient to permit the will to be read to the jury, when accompanied with evidence of possession by the devisee under the will, and of the declarations of one of the other witnesses, in his life time as to the due attestation by all the witnesses. *Jackson ex. d. Van Dusen et al. v. Van Dusen*, 5 Johns. Rep. 144.

An ancient will of land, which has accompanied the possession for thirty years, may be read in evidence, without proof of its execution. *Shaller et al. v. Brand*, 6 Binn. Rep. 435.

A grant admitted in evidence though it wanted many of the formal parts of a deed, having been accompanied by long possession. *Lee v. Tapscott*, 2 Wash. Rep. 276.

A deed of above thirty years standing, requires no further proof of its execution than the bare production, where the possession has gone with it, and there is no erasures. *Roberts et al. v. Stanton*, 2 Munf. Rep. 129. Et vide *Barr v. Gratz*, 4 Wheat. Rep. 213. *Stockbridge v. West Stockbridge*, 14 Mass. Rep. 257. *Thompson v. Bullock*, 1 Bay's Rep. 364.

After a long possession in severalty, a deed of partition may be presumed. *Hepburn et al. v. Auld*, 5 Cranch's Rep. 262.

So a sole possession under claim of right by one tenant in common for forty-two years, is sufficient to prove an ouster. *Vandyck v. Van Beuren et al.* 1 Caines' Rep. 83.

Where in a sale under a power contained in a mortgage, a drain of ten feet in width was excepted, after a lapse of sixteen years from the sale, it was intended that the drain had antecedently existed, and was founded in usage, or was an excep- tion in the previous deeds of the land. *Bergen v. Beunet*, 1 Caines' Cas. in Er. 1.

The mere possession by the heirs of a mortgagee of an ancient deed releasing the equity of redemption, is sufficient evidence of its execution, if the possession has accompanied it. *Mallory et al. v. Aspinwall et al.* 2 Day's Rep. 280.

A re-entry may be presumed after a lapse of time. *Jackson ex. d. Smith et al. v. Stewart*, 6 Johns. Rep. 34. After a possession of fourteen years. *Jackson ex. d. Goose et al. v. Demarest*, 2 Caines' Rep. 382. Vide *Jackson ex d. Donally et al. v. Walsh*, 3 Johns. Rep. 326.

In ejectment, the jury having found twenty years possession in the plaintiff, al- though it was objected to one of the title deeds that it was not indented, and expres- sed no consideration, it was not sufficient to prevent a judgment in his favour. *Kinney v. Beverly*, 2 Hen. & Munf. Rep. 318.

A deed bearing date sixty-three years, unaccompanied by possession, was ad- mitted in evidence upon proof of one who had known one of the witnesses, had seen

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(1) *Chattle
v. Pound*,
1701, Glib.
Law Ev. 103.
See also *Doe
dem. Howell
v. Lloyd*, Ap-
pend.

place where it was found.* But as this rule is founded on pre-
sumption, it does not apply to cases where there are circum-
stances to raise a contrary presumption,(1) as if the possession
has been contrary to the deed, or if the deed appear on the face
of it to be razed or interlined, or a man convey a reversion, first
to one, and then by a subsequent deed convey it to another, and
the second purchaser prove his title; in all these cases it will
be incumbent on the party to give the ordinary evidence of the
execution of his deed, for the presumption from the antiquity of
the deed is destroyed by the opposite presumption; in the one
case, that some unfair alteration has been made in the deed; in
the other, that the person having the possession had also a legal
right; for the law will not raise a presumption that a man would
be guilty of so manifest a fraud, as to convey the same estate to
two different people.

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of deeds re-
cited in others

Ford v. Grey,
1 Salk. 286.
Fitzgerald v.
Eustace, Glib.
Law. Ev. 100.

Vide *Hardr.*
120. *Cragg*
v. Norfolk,
2 Lev. 108.
See also *Ford*
v. Grey, 6
Mod. 45.

Another instance in which a deed is, according to some cases,
considered as proved without calling witnesses, is where one
deed recites another; in this case, the recital, it has been said,
is sufficient evidence of the recited deed, against the party to
that wherein it is recited, or against any one claiming under
him; but a stranger to it, evidence of the actual execution of the
first deed must be given, for the admission of another person
cannot affect him, and if such evidence were to be admitted,
deeds might easily be fabricated by false recitals.(z) But though

many deeds and papers signed by him, and from them he believed his name to the
deed to be of his hand writing, though he never had seen the witness write. *Thomas's les. v. Horlocker*, 1 *Dall. Rep.* 14.

Where the heirs of an intestate acquiesced for twenty years in the possession by a
purchaser, of the real estate of their ancestor, under a sale made by the administra-
tor, it was presumed that he took the oath and published the notifications required
by law previous to the sale; evidence being given of the order authorising him to
sell, and of the actual sale. *Gray v. Gardner*, 3 *Mass. Rep.* 399.

So where the question was on the validity of a title to land, derived under a col-
lector's sale of more than thirty years, it was held, that the jury were properly in-
structed to consider every thing as proved, which might reasonably and fairly be
presumed proved from the circumstances, as to the regularity of the tax bills, valua-
tions, warrants, &c. *Colman et al. v. Anderson*, 10 *Mass. Rep.* 105.—*Am. Ed.*

* In *Rex v. Inhabitants of Ryton*, 5 *T. Rep.* 239, it was held, that the produc-
tion of a parish certificate thirty years old, was sufficient, without evidence of the
place where it came from; but the common practice is for the attorney to be called,
to say that he had it from the title deeds of his client or elsewhere, to shew that it
came from the proper depository. Vide ante, 133, 156.

(z) If an ancient deed, which, when possession corresponds, proves itself, recite a
power of attorney necessary to give it validity, the due execution of it will be pre-
sumed. *Doe ex d. Clinton et al. v. Phelps*, 9 *Johns. Rep.* 169. *S. P. ibid. v.*
Campbell, 10 *Johns. Rep.* 475.

in the above cases, it is laid down in general terms, that as against the party to the reciting deed, such deed is evidence of that recited in it, yet there are others in which this seems to have been considered as secondary evidence, and admissible only when the first deed was shewn to be lost, or some other reason given for not producing the regular and best evidence of it. Such is now the general received opinion of the profession, and we find by a case which I have had occasion to cite in a former page, that even an admission of a deed on oath will not prevent the necessity of giving regular evidence of its execution. Chap. II. s. 4.
Presumption
of deeds re-
cited in others.
Ante, 145.

Something similar to the case of a recital is that of an enrolled deed under the Stat. Hen. 8. It has been supposed by some, that when a deed, requiring enrolment by that Statute, Proof of deeds
by enrolment.

So where the execution of the deed reciting the power of attorney is proved. *Davidson's les. v. Beatty*, 3 Har. & M'Hen. Rep. 594.

A recital in a will of a conveyance, is evidence of it, and will estop the heir of the testator. *Denn ex d. Colden et al. v. Cornell*, 3 Johns. Cas. 174.

The rule of law is, that a deed containing a recital of another deed, is evidence against the grantor, and all persons claiming by title from him subsequently. *Penrose v. Griffith*, 4 Binn. Rep. 231. *Garwood et al. v. Dennis*, *ibid.* 327. *Morris's les. v. Vandervan*, 1 Dall. Rep. 67. *Hite's heirs v. Shrader*, 3 Little's Rep. 447.

But it is not evidence against a stranger, nor where the title is derived from the grantor before the deed containing the recital. *Penrop v. Griffith*, 4 Binn. Rep. 231.

But where the existence and loss of the ancient deed, and death of the witnesses is proved, and no possession against the deed, and the recital is made by a person likely to be acquainted with the facts, it is evidence of the lost deed against strangers. *Garwood et al. v. Dennis*, 4 Binn. Rep. 314.

So where it is, by the person to whom the lost deed is alleged to have been made, who had been in possession a long time, and originally held as tenant by the courtesy, may be admitted to shew that he exercised acts of ownership of a public nature inconsistent with the courtesy estate. *ibid.*

A recital by two trustees that a third had refused to intermeddle with the trust, is not evidence of the fact. *Milne v. Cummings*, 4 Yeates' Rep. 577.

A recital that certain land had become the property of A. and that he had an estate in fee, is evidence against the grantor but he may shew that A. had but an estate for life. *Stoever v. Les. of Whitman*, 6 Binn. Rep. 416. But that the grantor had entered upon lands conveyed to A. for breach of a condition, does not estop a party claiming under A. and not under the deed, although the deed is given in evidence to shew a conveyance to A. *ibid.*

Recitals of mesne conveyances in a patent from the Commonwealth to A. are not evidence against B. who claims under a warrant prior to the date of the patent. *Penrose v. Griffith*, 4 Binn. Rep. 231. *Bell v. Les. of Wetherill*, 2 Serg. & R. Rep. 350. *Stewart v. Butler et al.* *ibid.* 382.

Quere, Whether after long possession it would not be. *Garwood et al. v. Dennis*, 4 Binn. Rep. 314.

The rule that the recital in a patent, is only evidence against persons claiming under the Commonwealth by title after the date of the patent, does not apply where defendant shews no title. *Downing v. Gallagher et al.* 2 Serg. & R. Rep. 455.

Facts recited in a private Act of Assembly, are not evidence in controversies between the applicant and strangers; but are against the Commonwealth. *Elmendorf v. Carmichael*, 3 Little's Rep. 479. A.M. Ed.

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Proof of deeds
by enrolment.

has been so enrolled, the bare proof of a copy from the enrolment would, in all cases, be sufficient evidence of its contents; and the case of *Smartle v. Williams*,⁽¹⁾ warrants that supposition. But no other case goes to that extent, and the subsequent Statute⁽²⁾ does not appear to put that construction on the Statute of enrolments. By that Statute,⁽³⁾ "for supplying a failure in pleading or deriving title to lands, tenements, or hereditaments, conveyed by deeds of bargain and sale indented and enrolled, according to the Stat. Hen. 8, where the original indentures of bargain and sale to be shewed forth or produced are wanting, which (it is recited) often happens, especially where divers lands, &c. are comprised in the same indenture, and afterwards derived to different persons, it is enacted, that where in any declaration, avowry, bar, replication, or other pleading whatsoever, any such indenture of bargain and sale enrolled shall be pleaded with a *profert in curia*, or offer to produce the same, the person or persons so pleading shall and may produce and shew forth, and be suffered and allowed to produce and shew forth, by the authority of this Act, to answer such profert, as well against her majesty, her heirs and successors, as against any other person or persons, a copy of the enrolment of such bargain and sale; and such copy examined with the enrolment, and signed by the proper officer having the custody of such enrolment, and proved on oath to be a true copy so examined and signed, shall be of the same force and effect, to all intents and constructions of law, as the said indentures of bargain and sale were and should be of, if the same were in such case produced and shewn forth."* I think it is plain, from the whole of this Statute, that it was intended to let in secondary evidence when the deed was in fact lost. The party was still compelled to make his profert, for the present practice of pleading a lost deed, was not then considered as admissible; and that he might not be fettered by the form of his pleading, a Statute was made to render the secondary evidence sufficient. It should therefore seem, that in this, as in all other cases, some evidence should be given of the inability to bring forward the best evidence, before that which is secondary is admitted.^(a) Lord

* Proceeding on the same principle, the Stat. 8 Geo. 2, c. 22, providing for the registry of deeds in the North Riding of Yorkshire, makes the enrolment evidence in case of loss by fire, &c.

(a) The copy of a deed enrolled in the King's Bench in England, and proved before the Lord Mayor of London to be a true one, was allowed to be given in evidence to a jury, to support a title to lands. *Les. of Hyam v. Edwards*, 1 Dall Rep. 1.

Chief Baron GILBERT certainly did consider the enrolment to be evidence, without any qualification ;(1) but this was so ably controverted by Mr. Justice BULLER ;(2) and appeared to be so generally understood as the practice, that I did not think it necessary, in any former edition, to do more than to notice it as a mode of proof when the deed was lost ;(3) but Mr. *Phillips* having(4) considered it as evidence in all cases, I have added this observation.

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Proof of deeds
by enrolment.

(1) *Gillb. Law.*
Ev. 86.

(2) *Nisi Prius*,
256.

(3) *Vide ante*,
61.

(4) 2d Ed.
355.

Where an award respecting land had been proved and recorded, under the Act of 1715, it was ruled that as an award was not a paper directed by the Act to be recorded, an office copy was not evidence. *James v. Gordon*, C. C. Jan. 1806, *M. S. Rep.* Et vide *Lee v. Tapscott*, 2 *Wash. Rep.* 280.

A copy of a copy of a policy of insurance, proved to have been compared with the register kept by an Insurance Company, and notice given to produce the original, cannot be given in evidence. The register itself ought to be produced, after proving the existence of the original. *U. States v. The Paul Shearman*, 1 *Peters' Rep.* 98.

A certified extract from a document in the office of the Surveyor General, is not evidence, not being a copy. *Les. of Griffith v. Tunckhouser*, 1 *Peters' Rep.* 418.

In *New York*, by Stat. sess. 36. c. 97, 1 *R. L.* 370, the proving and recording of deeds, &c. is provided for.

A party affected by the deed, may question its validity, and the force and effect of the formal proof. *Jackson ex d. Hardenburg et al. v. Schoonmaker*, 4 *Johns. Rep.* 161.

A paper purporting to be the record of a deed, not duly acknowledged, is a nullity, and not admissible either as a record or copy of a deed. *Doe v. Roe*, 1 *Johns. Cas.* 403.

An office copy of a deed proved prior to the Act of 1765, by one subscribing witness, is not evidence, although the deed is proved by one witness, and a schedule endorsed on the deed by the grantor, and referring to the deed, is proved by another. *Vickery v. McKnight et al.* 4 *Binn. Rep.* 204.

In *Virginia*, a certified office copy of a deed, is admissible as primary evidence. *Commonwealth v. Preston*, *Gilmer's Rep.* 235.

In *Pennsylvania*, the uniform construction of the 8th sect. of the Act of 1715, (1 *Sm. Laws*, 95,) since it has passed, has been, that it relates solely to mortgages, and defeasible deeds, in the nature of mortgages. *Burke v. Allen*, 3 *Yeates' Rep.* 351. *Geise v. Odenheimer*, 4 *Do.* 278.

Under the Act of 1715, deeds might be recorded in any one of the counties where part of the land lay, and the exemplification of the recording officer of that county was good as to the lands lying out of that county. *Les. of Delancey v. McKean*, C. C. Oct. 1806, *M. S. Rep.*

Such appears to have been the construction under the Act of 1775, (1 *Sm. Laws*, 422,) vide *Leazure v. Hillegas*, 7 *Serg. & R. Rep.* 313.

A deed dated prior to the Act of 18th March, 1775, is good, without being recorded. *Powers et al. v. McFerran et al.* 2 *Serg. & R. Rep.* 44.

The registering of a Sheriff's deed in the Prothonotary's office, is a sufficient recording within the Act of 1775. *Shrider's les. v. Nargan*, 1 *Dall. Rep.* 68.

The circumstance of title deeds remaining in the hands of a grantor, does not produce the same effect here as it might in *England*, where they have no general Statute for the registry of deeds. *Wilt v. Franklin*, 1 *Binn. Rep.* 522.

It is not a legal objection to a conveyance of land in *Pennsylvania*, that the grantor was out of possession. *Stoeber v. Les. of Whitman*, 6 *Binn. Rep.* 416.

A deed for lands while unrecorded, is no evidence of title, except against the grantor and his heirs. *French v. Gray*, 3 *Con. Rep.* 92.—AM. ED.

Chap. II. s. 4. The foregoing observations have been confined to the evidence required to prove the existence of deeds and their due execution, it remains to add a few observations on their admissibility in evidence when proved. A party is always bound by his own deed; and where a person is clearly entitled to an estate, any conveyance or charge by him is evidence against a stranger. But as a general rule it may be taken, that when the title is in dispute, one party cannot merely, by becoming a party to a deed, make evidence for himself or his descendants. If, indeed, a third person were to take a lease, and have possession, and pay rent under it, the possession and payment of rent would be evidence of themselves of title in the lessor; and so

(1) *Clarkson v. Woodhouse*, 5 T. Rep. 412.

(2) *Rogers v. Allen*, 1 Camp. 309.

fortified, the lease would be a strong act of ownership; (1) and where a number of counterparts of leases have been found amongst the muniments of the lessor, of so very remote a date as to preclude all evidence of actual possession, they have been received as evidence of his right: as have ancient entries on the rolls of a manor of licences, by the Lord, to persons to fish within certain districts, as evidence of his exclusive right of fishing within them. (2) But this evidence, though admissible, is so weak as to be entitled to no weight, unless acts of ownership are proved within more recent times.

SECTION V.

Of Evidence to explain written Instruments.

Chap. II. s. 5. A DEED, or other instrument, being produced and proved, is conclusive upon the rights of the parties, and no parol evidence can be received to contradict it, so as to enlarge or narrow its operation. (b) Thus, if there be a release of all demands, with-

5 Co. 26, s. Payler v. Homersham, 4 M. & S. 423. Butcher v. Butcher, 1 N. Rep. 113.

(b) The general rule is, that parol evidence is admissible to explain, but not to contradict, alter, add to, or diminish a written instrument. *Les. of Thomson et ux. v. White*, 1 Ball. Rep. 426. *O'Hara v. Hall*, 4 Do. 340. *M' Dermot v. U. S. Ins. Co. 3 Serg. & R. Rep. 604.* *M'Dowall v. Beckly*, 2 Rep. Const. Ct. S. Car. 265. *Jackson ex. d. Van Vetchen et al. v. Still et al.* 11 Johns. Rep. 301. *Dunham v. Baker*, 2 Day's Rep. 137. *Clark v. M'Millan*, 2 Car. Law Repos. 265. *Philips v. Keener*, 2 Overton's Rep. 329. *Bond v. Jackson*, 1 Cooke's Rep. 500.

In *Massachusetts*, it cannot be received, unless it contain some latent ambiguity. *Richards v. Killam*, 10 Mass. Rep. 239. *Paine et al. v. M'Fritter*, 1 Do. 69. *Revere v. Leonard et al.* *ibid.* 91. *Lewis v. Gray*, *ibid.* 297. *Watson et al. v. Boyles-*

out any recital to restrain its general operation, it cannot be Chap. II. s. 5.
Contradiction
of Deed
not admitted.

ten, 5 Do. 411. *Storer v. Freeman*, 6 Do. 435. *Barker v. Prentiss*, *ibid.* 430. *Murray v. Hatch*, *ibid.* 477. *Hunt adm. v. Adams*, *ibid.* 519. *King v. King*, 7 Do. 496. *Hunt adm. v. Adams*, *ibid.* 518. *Albee v. Ward*, 8 Do. 79. Et vide in *Virginia*, *Gatewood v. Burrus*, 3 Call's Rep. 194. *Tubb et al. v. Archer et al.* 3 Hen. & M. Rep. 399.

No parol evidence is admissible to shew the extent or legal operation of a writing or to control it. *Carter v. Bellamy*, *Kirk Rep.* 291. Nor to enlarge or vary a written contract. *Dunham v. Baker*, 2 Day's Rep. 137. Et vide *Stevens et al. v. Cooper et al.* 1 Johns. Ch. Rep. 425. *Barret v. Barret*, 4 Eq. Rep. 447. *M'Connell's heirs v. Dunlap*, *Hurdin's Rep.* 41. *Query v. White*, 1 Bibb's Rep. 271. *Lemaster v. Burkhart*, 2 Do. 28. *Garten et ux. v. Chandler*, *ibid.* 246.

Sed vide contra *Keating v. Price*, 1 Johns. Cas. 22. *Quere*, if a covenant or written lease. *Fleming v. Gilbert*, 3 Johns. Rep. 520.

But it may where a declaration is made before a deed is executed, shewing the design with which it was done, in cases of fraud and of trusts, though no trust was declared in writing. *Les. of Thompson et ux. v. White*, 1 Dall. Rep. 424. *Botsford v. Burr*, 2 Johns. Ch. Rep. 405.

So to prove a resulting trust. *Jackson ex d. Kane et al. v. Sternbergh*, 1 Johns. Cas. 153. *Foot et al. v. Colvin et al.* 3 Johns. Rep. 216.

Sed vide *Gilpins v. Consequa*, 1 Peter's Rep. 84. Et vide *Ross v. Norvell*, 1 Wash. Rep. 14. *Flemming v. Willis*, 2 Call's Rep. 13. *Beckwith v. Butler et al.* Wash. Rep. 224. Contra, *Lloyd et al. &c. v. Ingles' exr.* 1 Desaus. Eq. Rep. 333.

But in cases of fraud, vide *Fitzpatrick et al. v. Smith adm.* 1 Desaus. Eq. Rep. 340. *Coger's exr. v. M'Gee*, 2 Bibb's Rep. 321. So of trusts, *Guy v. Hunt*, 1 Murphy's Rep. 141.

But not that receipts given by heirs to administrators was intended for the shares of the real as well as personal estate. *Harris v. Dinkins et al.* 4 Desaus. Eq. Rep. 60.

In many cases, it has been received to explain, and in some sort to vary, what appeared on the face of the writings. *M'Meen v. Owen*, 1 Yeates' Rep. 135. *S. C.* 2 Dall. Rep. 178. *Cole v. Wendel*, 3 Johns. Rep. 90.

But not to affect the rights of third persons, uninformed of the facts, and who have bona fide, and for a valuable consideration, acquired rights under it. *Heilner v. Imbrie et al.* 6 Serg. & R. Rep. 401.

Nor to contradict a writing. *Herd v. Bissell*, 1 Root's Rep. 260.

A written instrument cannot be explained by parol evidence, unless it refers to something dehors, of so ambiguous a nature, as to require explanation. *M'Dermot v. U. S. Ins. Co.* 3 Serg. & R. Rep. 604.

So where an award on its face appears final. *Barlow v. Todd*, 3 Johns. Rep. 363.

It may of a variance of the thing sold from the written description. *Work v. Grier*, *Addis. Rep.* 372.

But not to shew the understanding and intention of the parties to a policy of insurance. *New York Ins. Co v. Thomas*, 3 Johns. Cas. 1.

Whenever the question arises on the construction of words, qua words, no parol evidence can be admitted. *ibid.* 601. *Revere v. Leonard*, 1 Mass. Rep. 91. *How et al. v. Bates*, 2 Do. 380.

But it is admissible when it is necessary to know what cause of action the plaintiff prosecuted before arbitrators, or what discount was brought forward by defendant. *Bazire v. Barry*, 3 Serg. & R. Rep. 461. *Zeigler v. Zeigler*, 2 Do. 286.

Quere, Whether it could be received of a mistake made by the clerk of the peace of the county in registering the name of a negro slave, the original return of the supposed owner being missing. *Campbell v. Wallace*, 3 Yeates' Rep. 572.

That a negro named *Lucy*, was the person intended to be entered in the registry as *Ruth*, was rejected. *Lucy v. Pumphrey*, *Addis. Rep.* 380.

Chap. II. s. 5. shewn by parol evidence that a particular sum of money was intended to be excepted out of it;* not, if it is so restrained, Contradiction of Deed not admitted.

But it was admitted to prove, that an entry of a negro, purporting to have been made on a certain day, was not made until a later day. *Giles v. Meeks, Addis. Rep. 384.*

So on a written warranty, that a negro is sound, to shew that at the time of sale, the vendor informed the vendee of the defect. *Schuyler v. Russ, 2 Caines' Rep. 201.*

But it is inadmissible to shew, that a certain part of land, included in a deed by administrators, was excepted out of the estate at the time of sale. *Les. of Snyder v. Snyder, 6 Binn. Rep. 483. Jackson ex. d. Russell et al. v. Croy, 12 Johns. Rep. 427.*

Where a deed expressed a certain number of acres, which were paid for, evidence will not be admitted to shew a mistake in the quantity. *Howes v. Barker, 3 Johns. Rep. 498.*

But where an advertisement stated that a farm would be sold, without stating that the whole would be evidence of the declarations by the Sheriff, at the time of sale, that a particular part would not be, was admitted. *Les. of Wright v. Decklyne, 1 Peter's Rep. 199. Vide Dolan v. Briggs, 4 Binn. Rep. 496.*

If land is described by references to matters not contained in the deed, and which could only be made to appear by parol evidence, the jury ought to decide, what land was the subject of the contract. *Richardson v. Les. of Stewart, 2 Serg. & R. Rep. 84.*

Documents certified by a foreign notary, tending to prove a transfer of an American vessel to a foreigner, may be contradicted by parol testimony. *U. States v. The Jason, 1 Peter's Rep. 430.*

* Where there was a reference of all matters in difference, and the arbitrators made an award as to all matters which the parties brought before them; it was held, that this did not preclude them from shewing that there were other matters which had not been disputed before the arbitrators. *Raves v. Farmer, 4 T. Rep. 146.* But in a subsequent case, where one party contended that he was entitled to a deduction arising out of the very transaction, the Court of King's Bench held he could not claim it afterwards, though he did not submit it to the arbitrator at the time. *Smith v. Johnson, 15 East, 213.* We had before occasion to notice the like decision, as in *Raves v. Farmer*, in the case of a judgment, where the plaintiff had not given the whole of his demand in evidence before the jury. *Vide ante, 68, 69.* Another exception to this rule is the date of the deed, which is never conclusive as to the time of delivery, from which alone the deed takes its operation; for it is open to the party in all cases to shew, that the deed was executed on a day different from that whereon it appears to bear date. *Shep. Touch. 72. Hall v. Cazenove, 4 East, 477.†*

† The subscribing witness to a deed attests nothing but its sealing and delivery; therefore a witness to it may be called to prove it antedated. *Fox's les. v. Palmer et al. 2 Dall. Rep. 214.*

So a feme covert who had executed a deed with her husband. *Jackson ex d. Griswold et al. v. Bard, 4 Johns. Rep. 230.*

The date of a deed is not the essence of it, and the party to it is not estopped from saying the contrary of that which appears on his own deed. *Cutlar's adms. v. Cutlar's exrs. 2 Hayw. Rep. 154.*

The date of a policy of insurance may be inquired into. *Earl v. Shaw, 1 Johns. Cas. 313.*

A mistake in the date of a deed will not vitiate its effect. *Jackson ex d. Hardenberg et al. v. Schoonmaker, 2 Johns. Rep. 230.—Am. Ed.*

can parol evidence be received to give it a larger and more extensive effect. So where an auctioneer put up a copyhold es-
 Chap. II. s. 5.
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 of Deed
 not admitted.

In an action on a bond given for the purchase of land, evidence of the value of the property sold, was ruled to be inadmissible. *Lee v. Biddis*, 1 *Yeates' Rep.* 8.

It seems, that parol evidence is admissible of what passed at the time of the execution of deeds, and to shew fraud, mistake, or trust, or matters not inconsistent with the deed, but not to prove conversations between the parties the day before the execution of a deed, in order to vary their engagements. *Cozens v. Stevenson*, 5 *Serg. & R. Rep.* 421.

It is settled law, that what passed at or before the execution of an instrument, is admitted in cases of fraud and plain mistake, in drawing the writing. *Christ v. Diefenbach et al.* 1 *Serg. & R. Rep.* 464.

So where a promise by one party, induced the other to execute the instrument. *Campbell v. M^c Clenachan*, 6 *Serg. & R. Rep.* 171. Et vide *Southerby et ux. v. Arden et al.* 1 *Johns. Ch. Rep.* 240. *Keisselbrach v. Livingston*, 4 *Do.* 144. *White v. Eagan*, 1 *Bay's Rep.* 247. *Morris v. Morris*, 2 *Bibb's Rep.* 311.

Parol evidence allowed to be given of an agreement, that the grantor should defend all suits, upon a covenant "to make good the land against all persons claiming." *Birchfield adm. v. Castleman*, *Addis. Rep.* 181.

But it was admitted to shew from what passed at the time of executing articles of agreement, that it was the intention of A. to include a certain manor in a deed of all his lands in Pennsylvania. *Hurst's les. v. Kirkbride et al.* cited 1 *Yeates' Rep.* 139.

Sed vide *Field et al. v. Biddle*, 2 *Dall. Rep.* 171. 1 *Yeates' Rep.* 132. Vide what YEATES J. says, 3 *Binn. Rep.* 314. *Les. of Church v. Church*, 4 *Do.* 280. *Hill v. Ely*, 5 *Serg. & R. Rep.* 366.

But the ground on which the evidence was received, was that of fraud. *Wallace v. Baker*, 1 *Binn. Rep.* 610. Et vide *Les. of Dinkle v. Marshall*, 3 *Binn. Rep.* 587.

Parol evidence is inadmissible in the Circuit Court of the United States, to shew that at the time of executing a written assignment of a bond, the assignor expressly guaranteed the payment of it. *O'Hara v. Hall*, 4 *Dall. Rep.* 340. *Clarke v. Russell*, 3 *Dall. Rep.* 415. Et vide *Stubbs v. Burwell*, 2 *Hen. & Munf. Rep.* 536.

It is inadmissible to prove what the assignor represented due on the bond. *Buckner v. Curry*, 1 *Bibb's Rep.* 477.

But it is admissible to shew that at the time of entering into articles for the sale of land, it was agreed by the parties that the instalments should be made in whatever money was current, at the time they fell due, the articles not specifying it. *M^cMeen v. Owen*, 2 *Dall. Rep.* 173. *S. C.* 1 *Yeates' Rep.* 135.

So, if made at the time of executing the instrument, in the absence of the other party, and not communicated to him. *Wallace v. Barker*, 1 *Binn. Rep.* 610. *Wolf v. Carothers*, 3 *Serg. & R. Rep.* 240.

Evidence of a parol declaration of Mr. Penn, respecting a sale of land, was rejected. *Richardson's les. v. Campbell*, 1 *Dall. Rep.* 10.

The declarations of a grantor, after the execution of a deed, which was expressed to be made for a valuable consideration, that he had paid nothing for it, is inadmissible. *Church v. Church*, 4 *Yeates' Rep.* 480. Vide *Brashier v. Burton*, 3 *Bibb's Rep.* 9.

But admissible to prove that a purchase was partly for the use of another. *Gregory's les. v. Setter*, 1 *Dall. Rep.* 193.

So that a mortgage to A. was intended for the security of B. *Peterson v. Willing et al.* 3 *Dall. Rep.* 506.

So that a deed to A. was in trust for B. *Boyd v. M^cLean et ux.* 1 *Johns. Ch. Rep.* 532.

Chap. II. s. 5. tate for sale by auction, which in the conditions for sale was Contradiction of Deed

not admitted. Likewise that a note signed by one partner was given on behalf of the firm. *Ownings v. Trotter et al.* 1 *Bibb's Rep.* 157

Declarations of the grantor to the grantee after the execution of the deed of trust, but before the grantee had accepted it, are evidence to explain the trust. *Drum v. Les. of Simpson*, 6 *Binn. Rep.* 478.

Declarations of the grantor at the time of the execution of the deed—that he did it only for a sham, so that the people could not come at his land, are not admissible if made in the absence of the grantee, and if no ground is laid, tending to shew fraud or a trust. *Reichart v. Castator et al.* 5 *Binn. Rep.* 109. Et vide *Hatch et al. v. Straight*, 3 *Con. Rep.* 31.

Supposing that a mistake in drawing articles, may be proved by parol, yet in an action on them, the plaintiff cannot prove by parol an agreement, different from that on which he has declared. *Barndollar v. Tate*, 1 *Serg. & R. Rep.* 160. Contra, *Baird et al. v. Blaisgrove*, 1 *Wash. Rep.* 170.

Where the parties reduced their agreement to writing in a bill of sale, no action will lie on a parol warranty at the time of sale. *Mumford et al. v. McPherson et al.* 1 *Johns. Rep.* 413. *McWilliams v. Willis*, 1 *Wash. Rep.* 199.

A receipt is only evidence of a payment and satisfaction, and may be explained by parol or other testimony. *Maze v. Miller*, C. C. Jan. 1806, *M. S. Rep.* *Ensign v. Webster et al.* 1 *Johns. Cas.* 145. *McKinstry v. Pearsall*, 3 *Johns. Rep.* 316. *Tobey v. Barber*, 5 *Do.* 68. *Tucker v. Maxwell*, 11 *Mass. Rep.* 143. *Johnson v. Johnson*, *ibid.* 359. *Thompson et al. v. Fausset*, 1 *Peter's Rep.* 182. *House v. Low*, 2 *Johns. Rep.* 378.

Parol evidence cannot be given of a fact in relation to which there exists a contract in writing. *McKinney v. Les. of Leacock*, 1 *Serg. & R. Rep.* 27. *Marshall v. Sprott*, *Addis. Rep.* 361. But it was admitted, where there was a provision for compensation, on a contingency relative to the contract. *Work v. Grier. ibid.* 372.

Although written articles of partnership are entered into, yet parol evidence is admissible, to prove the existence of a partnership. *Widdisfield et al. v. Widdisfield*, 2 *Binn. Rep.* 245.

The declarations of a person that he was authorised by a power of attorney from the plaintiff to sell lands, are not evidence, it ought to be produced, or its loss proved. *Vanhorn v. Frick*, 3 *Serg. & R. Rep.* 278. *The Proprietors of Kennebeck Purchase v. Call*, 1 *Mass. Rep.* 483.

Parol evidence may be given of a sale of lands, under an order of the Orphans' Court, without a return made thereon. *Rham v. North*, 2 *Yeates' Rep.* 117.

Evidence of the parol declarations of a grantor, tending to invalidate his own deed, is inadmissible. *Clyde v. Clyde*, 1 *Yeates' Rep.* 92. *Les. of Simon v. Gibson et al. ibid.* 291. *Les. of Hubley et al. v. White et al.* 2 *Do.* 133. *Barrett et ux. v. French*, 1 *Con. Rep.* 354. Et vide *Pharix v. Dey et al.* 5 *Johns. Rep.* 412. *Colbank's exrs. v. Burt*, 2 *Hayw. Rep.* 330.

In slander, for saying "the Rev. T. S. is a perjured man," &c. parol evidence is admissible to prove that plaintiff is a minister of the gospel. *Cummin v. Smith*, 2 *Serg. & R. Rep.* 440.

Where a decree of sale of a foreign tribunal was by parol, it may be proved by parol. *Wood v. Reasants*, C. C. April, 1813, *M. S. Rep.*

So it was admissible in an action on an award for damages done to the plaintiff's land, where defendant gave in evidence the record of a recovery in a former action, in which a *continuando* was laid, including the time in dispute, to shew that on the former trial, the plaintiff waived his claim to damages for part of the time laid in the *continuando*, and that the jury under the direction of the Court, did not include that period of time in estimating their damages. *Haak v. Breidenbach exr.* 3 *Serg. & R. Rep.* 204.

In covenant on a special warranty, the covenantee, in order to shew that he has

been evicted in an ejectment, by a person claiming under the grantor, may shew, by parol evidence, what was the testimony given on the trial of the ejectment. *Leather v. Poulteney, & Binn. Rep. 252.*

But not to shew that the sum in a receipt of twenty-five years standing was continental money. *Robert et al. v. Garnie*, 3 Caines' Rep. 14.

Chap. II. s. 5. out that there was a charge affecting the estate, on which ac-
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So to shew the consideration money not paid. *Shepard v. Little*, 14 *Johns. Rep.* 210.

In special assumpsit for damages, on a breach of promise to convey the privilege of a water course, parol evidence of the agreement was admitted. *Clyde v. Clyde*, 1 *Yeates' Rep.* 92.

Parol evidence of a person having a freehold, is admissible, to shew a settlement gained by a pauper. *Commonwealth v. Jennings*, 1 *Brown's Rep.* 197.

The real time of the delivery of a deed may be shewn by parol. *Geiss et ux. v. Odenheimer*, 4 *Yeates' Rep.* 278. But its acknowledgment cannot. *Pendleton v. Button*, 3 *Con. Rep.* 406.

Parol evidence is inadmissible to shew that a lease executed in the name of, and reserving a rent to, one person, was intended for the benefit of another. *Jackson v. ex. d. Bonnel et al. v. Foster*, 12 *Johns. Rep.* 488.

Though parties and privies are estopped from contradicting a written instrument by parol proof, the rule does not apply to strangers. *Overseers of Berlin v. Overseers of Norwich*, 10 *Johns. Rep.* 229.

In some cases parol evidence of an agreement, posterior to a written contract, would be admissible. *Barber v. Brace et al.* 3 *Con. Rep.* 9. Contra, *Mumford et al. v. M. Pherson et al.* 1 *Johns. Rep.* 413.

Parol evidence of a conviction for felony, is inadmissible, though the record was burnt, there being a transcript in the Court of Exchequer. *Hills v. Colvin*, 14 *Johns. Rep.* 182.

Quere, Can parol evidence be given of the loss and contents of a discharge under the insolvent law. *Schenck et al. v. Woolsey*, 3 *Caines' Rep.* 100.

Parol evidence of the contents of a paper relating to facts collateral to the issue, is sufficient. *Mumford v. Bowne*, *Anth. N. P.* 40.

Parol evidence is inadmissible to prove the grounds of a regular judgment of a Court of competent jurisdiction. *Legg v. Legg*, 8 *Mass. Rep.* 99.

On a bill for specific execution of a marriage agreement, parol evidence of the real intention of the parties admitted. *Flemings v. Willis*, 2 *Call's Rep.* 5.

In the construction of contracts, the situation of the parties, the subject matter of their transactions, and the language of their instruments are to be taken into consideration. *Sumner adm. v. Williams et al.* 8 *Mass. Rep.* 162. *Fowler v. Bigelow*, 10 *Do.* 379. *Leland v. Stone*, *ibid.* 459. *Hopkins v. Young*, 11 *Do.* 302.

A promise to pay the debt of another, must be entirely in writing, and cannot be added to, or varied, nor so far explained by parol evidence, as to affect its import. *Clarke v. Russell*, 3 *Dall. Rep.* 424.

A bill of parcels delivered by J. stating the goods as bought by D & J. is not conclusive evidence against J. that the goods were their joint property—but the real circumstances may be explained by parol. *Harris v. Johnston*, 3 *Cranch's Rep.* 311.

Parol evidence is not admissible in an action on the covenant of seisin, to prove prior claims on the land. *Pollard et al. v. Dwight et al.* 4 *Cranch's Rep.* 421. Nor to alter the condition of a bond. *Atkinson v. Scott's exrs.* 1 *Bay's Rep.* 307. But it is to shew that an absolute bond was intended as a counter security. *Todd et ux. v. Rivers's exrs.* 1 *Dessaus. Eq. Rep.* 155.

An erasure in a deed in pursuance of an agreement, whether prior or subsequent to its execution, does not avoid it, and such consent may be proved by parol. *Speake et al. v. U States*, 9 *Cranch's Rep.* 28.

Where a check was drawn by the cashier of an incorporated bank, and it was doubtful on its face, whether it was an official or a private act, parol evidence was admitted to shew that it was a private act. *Mechanicks Bank v. Bank of Columbia*, 5 *Wheat. Rep.* 336.

Where a deed mentions the course and distance of a line, without any other description, parol evidence is admissible to prove that marked trees not in the course

count the purchaser refused to complete his contract; it was Chap. II. s. 5.
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not admitted.

or termination of that line to be the line intended. *Baker v. Seekright*, 1 *H. & M. Rep.* 177. *Ex v. Middleton v. Perry*, 2 *Bay's Rep.* 539. *Niblick v. Hazebri's exrs.* 1 *Marth. Rep.* 96. *Mageehan v. Les. of Adams*, 2 *Binn. Rep.* 109.

Quere, Whether proof of confession by the assignor of a bond, after the assignment, that the money had been paid to him before the assignment, can be given in evidence against the assignee. *Lewis v. Long*, 3 *Mumf. Rep.* 136.

A party to an instrument may be a witness to facts, subsequent to the execution thereof, which tend to invalidate it. *Webb v. Danforth*, 1 *Day's Rep.* 301.

Where the record of a judgment is of a term generally, and it is material to ascertain the particular day on which it was rendered, it may be shown *aliunde*. *Young v. Kenyon*, 2 *Day's Rep.* 252.

So upon an issue under the late bankrupt law of the *U. States*, the specific act of bankruptcy, and the day on which it was committed, may be proved by parol. *Bellden v. Edwards*, *ibid.* 246.

Where the grantor described the premises as the farm on which he then dwelt, the ambiguity was held a latent one, which might be explained by evidence *aliunde*. *Doolittle et ux. v. Blakeeley*, 4 *Day's Rep.* 965, 465.

The alteration of a writ of attachment may be proved by parol evidence in a suit between other parties, to shew a dissolution of the lien created by the attachment. *Peck v. Sill*, 3 *Con. Rep.* 157.

In an action for fraud in the sale of a privilege under a patent right, the plaintiff proved that a certain patent had been granted previously to a third person, and then offered parol evidence to shew that defendant's patent was the same; held admissible. *Bull et al. v. Pratt*, 1 *Con. Rep.* 342.

Parol evidence admitted to shew that it was the understanding of the parties, that the demand and notice required by law to charge the endorser should be dispensed with; "I do request that hereafter, any notes that may fall due in the *U. States Bank*, in which I am or may be endorser, shall not be protested, as I will consider myself bound in the same manner as if they were legally protested." *The Union Bank v. Hyde*, 6 *Wheat. Rep.* 572.

Parol evidence of the contents of a confession made by a defendant on a criminal prosecution, and reduced to writing, is admissible in a civil action. *Patton v. Freeman et al.* 1 *Coxe's Rep.* 113.

Though there may be a written confession of the accused, taken before a Judge, parol testimony of confessions on other occasions, are admissible in evidence. *The State v. Wills*, 1 *Coxe's Rep.* 424.

A party who has a mutilated paper, shall not be permitted to prove the nature and contents of the part torn off, by parol testimony. *Administrator of Price v. Administrator of Tallman*, 1 *Coxe's Rep.* 447.

In an action on a note, wherein the defendant promised to pay the plaintiff twelve months after date two hundred and fifty dollars in brown cotton shirting, at the price of thirty cents per yard, the defendant, after a default, offered evidence to shew, that cloth of that description, at the time the note became payable, was of less value than thirty cents per yard: held inadmissible. *Brooks v. Hubbard*, 3 *Con. Rep.* 58.

Parol evidence of a person's acting as constable, admissible. *Stout v. Hopping*, 1 *Hals. Rep.* 125.

So to prove a defendant a Judge. *Gratz v. Wilson*, 1 *Hals. Rep.* 419.

Administrations cannot be proved by parol. *Hay v. Bruere et al.* 1 *Hals. Rep.* 212.

Where the plaintiff gave to the deputy Sheriff, who had the defendant on a *ca. sa.* a writing stating that he wished the defendant shewed as much insolence as he could, with safety to himself, and without hazarding the debt; held, that parol evidence of the conversations between the plaintiff and the officer, at the time, and of extraneous circumstances, to ascertain the nature of the indulgence which the officer

Chap. II. s. 5. not permitted to the seller to prove that the auctioneer, at Contradiction of Deed not admitted.

was to shew the prisoner, was admissible. *Ely et al. v. Adams*, 19 *Johns. Rep.* 313.

Where the words "*British weight*," in a charter party may have two meanings, it is such a latent ambiguity, as to warrant the introduction of parol testimony, to shew, whether, in commercial usage, it is understood to mean *gross* or *nett* weight. *Goddard v. Bulow*, 1 *Nott & Mc Cord's Rep.* 45.

Where an agreement is reduced to writing, all previous negotiations resting in parol, are extinguished and cannot be resorted to for the purpose of helping out, or of explaining its meaning. *Parkhurst et al. v. Van Cortland*, 1 *Johns. Ch. Rep.* 273. *Smith v. Williams*, 1 *Carolina Law Repos.* 263. n. Cases of fraud are exceptions to this rule. *ibid.* Et vide *Marshall v. Sprott*, *Addis. Rep.* 360.

Parol evidence is inadmissible to support an agreement, set up in contradiction to a deed. *Movan et ux. v. Hays*, 1 *Johns. Ch. Rep.* 339.

So to prove a title to the service of a servant, where the plaintiff has set out in his narr. a title by indenture. *Hall et al. v. Gardner et al.* 1 *Mars. Rep.* 171.

The date of a policy of insurance may be inquired into by parol testimony. *Earl v. Shaw*, 1 *Johns. Cas.* 313.

Where several lots are mortgaged, the mortgagor, or purchaser under him, cannot set up a parol agreement made at the time of the mortgage, that in case either of the lots were sold, the mortgagee would release the lot so purchased, on being paid a certain sum per acre by the purchaser. *Stephens et al. v. Cooper et al.* 1 *Johns. Ch. Cas.* 425.

A defendant in a writ of partition, sets up that there was a will disposing of the land, which could not be found; he proved its legal execution, that the testator on his death bed, recognised its existence, and when it could not be found said, he believed it must have been left with *J. M.*, who drew and witnessed it. Held, that parol evidence of its contents was admissible. *Reeves v. Booth et al.* 2 *Rep. Const. Ct. S. Car.* 334.

Parol evidence received to prove the loss and existence of a marriage settlement, corroborated by other deeds, referring to and speaking of the settlement; the contents of the lost deed also ascertained by reference to other deeds, and the whole deed of settlement construed. *Potts v. Cogdell*, 1 *Dessaus. Eq. Rep.* 454. But the drawer of such settlement shall not prove that the intention of such deed is different from what appears on its face, the being no allegation of fraud. *Dupree v. McDonald*, 4 *Do.* 209.

Parol evidence of a parol sale of land in a case not tainted with fraud, will not be received. *Askew v. Poyas*, 2 *Dessaus. Eq. Rep.* 145. *Givens et ux. v. Calder*, *ibid.* 171.

But it is admissible to explain the meaning of the parties in marriage articles, when a conveyance is called for. *Kennings v. Willis*, 3 *Coll's Rep.* 5.

Parol evidence of the conversation between the testator and the penner of his will, as to the occasion of particular bequests, admitted to shew that those bequests were in satisfaction and lieu of an anterior provision for those legatees made by deed; and the legatees put to their election, to take under the will or deed. *Webb et al. v. Longstaff exr.* 3 *Dessaus. Eq. Rep.* 504.

So to prove the intention of the testator, to dispose of the property in a manner not apparent on the face of the will. But such was its obscurity that the testimony if received, would not have explained it. *Rothmahler's admx. v. Myers et al.* 4 *Do.* 215.

Quere, if parol evidence admissible to prove that a *patent* was obtained by fraud. *Witherinton v. McDonald*, 1 *H. & Munf. Rep.* 306. Sed vide *Hambleton et al. v. Wells*, *ibid.* note, 307.

Parol evidence not admissible to shew that the deviser used the word "*heirs*," in a different sense from the legal meaning. *Den ex. d. Smith's heirs v. Barnes*, 1 *Carolina Law Repos.* 491.

the time of the sale, had given public notice of the incum- Chap. II. s. 5.

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not admitted.

The justice's record, the justice and the jury, will be admitted to testify whether a certain claim was brought in, to be an off-set, on a trial at law in the State of New York. *Stevens v. Paine*, 2 Root's Rep. 83.

A parish record, containing a grant of money by the inhabitants of a parish, may be contradicted. *Bangs v. Snow et al.* 1 Mass. Rep. 181.

Parol evidence admitted to prove that a conveyance was acknowledged in Court at a different time than that stated in the record. *Elliott's les. v. Osborn*, 1 Har. & M'Hen. Rep. 146.

Parol evidence admitted to disprove the certificate of a justice, who took the acknowledgment of a deed, by proving an *alibi* of the grantor. *Smith v. Ward*, 2 Root's Rep. 374.

A Court of Chancery will give relief against the mistakes of a scrivener in drawing a deed which is executed, and against those wishing to take advantage of it. *Elmore v. Austin*, *ibid.* 415.

Parol evidence cannot be received to shew that a deed stating a course for thirty-six chains meant twenty-nine chains. *Jackson ex. d. Putnam et al. v. Bowen*, 1 Caines' Rep. 358.

Where a printed blank policy of insurance on cargo was used, and the blank filled up on profits, and the valuation in writing when taken in connection with the printed words was a valuation of the goods, parol evidence was held inadmissible to explain the intention of the parties, there being no ambiguity in the words as they stood. *Munford v. Hallett*, 1 Johns. Rep. 433.

In an action on a bond given for the price of a chattel sold, the defendant cannot give in evidence a want or failure of consideration on the ground of false representation or warranty of the chattel sold. *Vrooman v. Phelps*, 2 Johns. Rep. 177.

In an action by the assignee of a bond against the obligor, parol evidence that the principal or interest of the bond was intended to have been made payable at a later date than appeared on the face of it, is inadmissible. *Davis v. Cammel*, *Addis. Rep.* 233. *Cook v. Ambrose*, *ibid.* 323.

Where by articles of agreement a stipulation was entered into to give a deed of conveyance, evidence was admitted to prove that the parties intended a deed conveying the land free from all incumbrances. *Zantzinger v. Ketch*, 4 Dall. Rep. 132.

A contract under seal was set aside in Equity upon circumstantial evidence of its abandonment. *Cringan et al. v. Nicholson's exrs.* 1 Hen. & M. Rep. 428.

If defendant, in his answer to a bill in Chancery to compel the specific execution of a written agreement, deny the obvious interpretation thereof according to its words, parol evidence on the part of the complainant is admissible to explain it. *Coutts v. Craig*, *ibid.* 618.

An agreement completed by the execution of the proper deeds of conveyance, cannot be altered, unless there be fraud, or manifest error or mistake, when it may be corrected in Equity. *Vance v. Walker*, 3 Hen. & M. Rep. 288.

If A. agree under seal to sell B. a tract of land lying on a certain creek without specifying any boundaries, and a particular tract is shewn to B. as the land, parol evidence may be admitted to shew either that A. had no land there, or not that particular tract. *Buster's exrs. v. Wallace*, 4 Hen. & M. Rep. 82.

Notwithstanding an absolute bargain and sale, and receipt at the foot thereof in full for the consideration expressed therein, the vendor under certain circumstances may retain an equitable lien on the land for the purchase money, even against a vendee having notice of such an agreement between the parties. *Duval v. Bibb*, *ibid.* 113.

A vendor who has given a conveyance and delivered possession, has not a lien for the purchase money due on a bond, against a subsequent judgment creditor. *Sample v. Bird*, 7 Serg. & R. Rep. 286. Et vide *Kauffelt v. Bower*, *ibid.* 64.

Chap. II. s. 5. brance.(1)(c) In like manner, where printed conditions of sale of timber, growing on a certain close, omitted to state any thing of the quantity, parol evidence that the auctioneer, at the time of the sale, warranted a certain quantity, is not admissible.(2) So

(1) *Gunnis v. Erhart*, 2 H. Black. 282.

(2) *Powell v. Edmunds*, 12 East, 6.

(3) *Buekler v. Miller*, 2 Vent. 107.

(4) *Woodbridge v. Spooner*, 3 Barn. & Ald. 233.

where a bond is conditioned for the performance of certain acts, the condition is conclusive on the parties, and cannot be controlled by any parol evidence that the agreement was otherwise,(3)(d) nor is such evidence admissible, unless for the purpose of shewing that the instrument is void altogether, as being obtained by fraud or misrepresentation. So where a promissory note is made payable on demand, evidence cannot be admitted to shew that it was not to be paid till after the death of the maker.(4)(e) But if an ambiguity arise, it may be ex-

Though a deed refer to matter extrinsic, to explain which a resort to parol evidence may be necessary, that will not authorise parol evidence to be given to explain or contradict the deed itself. *South Carolina Society v. Johnson*, 1 M. Cord. Rep. 41. Et vide *Milling et al. v. Crankfield*, *ibid.* 258.—AM. Ed.

(c) The general rule of law is, that parol evidence of declarations of an auctioneer to contradict the written terms of sale, are not admissible. *Les. of Wright v. Deklyne*, 1 *Peters' Rep.* 199. Sed vide contra *Wainwright v. Read et al.* 1 *Dessaus. Eq. Rep.* 573.—AM. Ed.

(d) Parol evidence is admissible to shew that when a bond was executed, it was agreed that it should be void on a particular contingency. *Field et al. v. Biddle*, 2 *Dall. Rep.* 171. *S. C.* 1 *Yeates' Rep.* 132. Et vide 3 *Binn. Rep.* 315.

So that it was delivered as an escrow. *Skinner v. Hendrick*, 1 *Root's Rep.* 252. *Pawling et al. v. U. States*, 4 *Cranch's Rep.* 219.

So in Chancery, that a bill of sale of chattels, though absolute on its face, was intended as a mortgage. *Ross v. Norvell*, 1 *Wash. Rep.* 19. *Marks et al. v. Pell*, 1 *Johns. Ch. Rep.* 594. *Strong et al. v. Stewart*, 4 *Do.* 167. *Dabney v. Green*, 4 *Hen. & Munf. Rep.* 101.

So of a deed. *Washburn v. Merrills*, 1 *Day's Rep.* 139. *Ray v. Bush*, 1 *Root's Rep.* 81. *Morgan v. Minor*, 3 *Do.* 220.

That a conditional note was delivered as an escrow. *Couch v. Meeker*, 2 *Con. Rep.* 302. Et vide *Flemings v. Willis*, 2 *Call's Rep.* 5. *Robertson v. Campbell*, *ibid.* 421. *Gatewood v. Burns*, 3 *Do.* 194. *Herbert v. Wise*, *ibid.* 239. *Dabney et al. v. Green*, 4 *H. & Munf. Rep.* 101. *Chapman v. Turner*, 1 *Call's Rep.* 220. *King v. Newman*, 2 *Munf. Rep.* 40. Contra, *The adm. of M. Teer v. Sheppard*, 1 *Bay's Rep.* 461. *Holmes v. Simons*, 3 *Dessaus. Eq. Rep.* 149. *Dickerson v. Dickerson*, 1 *Carolina Law Repos.* 262.

Parol evidence that a note was given as an indemnity, is inadmissible. *Perkins v. Kent*, 1 *Root's Rep.* 312. Et vide *Converse v. Moulton*, 2 *Do.* 195.

So that a note for value received was given for a consideration bad in law. *Ketchum v. Scribner*, 1 *Root's Rep.* 95.

Where no place is mentioned in a note, at which the money is to be paid, parol evidence is admissible to shew at what place it was agreed to pay it. *Thompson v. Ketcham*, 4 *Johns. Rep.* 285.—AM. Ed.

(e) Parol evidence is admissible in an action by the endorsee against the endorser of a note, endorsed in blank, to shew that at the time of the endorsement, the

plained by evidence, though, in this case, a distinction has been made between what is called a *latent ambiguity*, and that which is not so. The *latent ambiguity* is that which does not appear on the face of the instrument, where every thing seems right and clear, but the meaning being rendered uncertain, by the proof of some fact, the law permits the removal of the doubt by the like evidence.

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Ambiguities.

(1) Jones v.
Newman,
4 Black. 60.
Cheney's case,
5 Co. 68. S. P.

And, therefore, where a testatrix devised her estate to her cousin, *John Chuer*, there being both father and son of that name, parol evidence was admitted to shew that the son was the person meant; (1) and where a devise was made to one by the name of *Mary*, whose name was *Elizabeth*, (2) this also was permitted to be cleared up by parol evidence, (f)* for in all these

(2) Doe dem.
Cooke v.
Danvers,
7 East, 299.

endorsee received the note under an agreement, that he should not have recourse upon it to the endorser. *Hill v. Ely*, 5 Serg. & R. Rep. 363.

Where defendant endorsed in blank the note on which suit was brought, he cannot prove that his endorsement was merely for the purpose of a power of attorney. *Hungerford v. Thomson*, *Kirb. Rep.* 393. Vide 1 *Root's Rep.* 201. *Smith v. Barker*, *ibid* 207.

The makers and endorsers of a promissory note may legally stipulate by a parol agreement that there shall be no recourse over to them under certain circumstances. *Cummings v. Fisher*, 1 *Anth. N. P. Cas.* 4.

In an action of *scire facias* against bail, the defendant pleaded that another person of the same name and description became bail, and traversed that he was the person named in the bail piece. At the trial it was proved that the name of *Elnathan Noble* was inserted in the bail piece; but *Stephen Norton* was the person who intended to become bail, and who, in fact, appeared before the Judge who signed the acknowledgment on the bail piece. It was held, that this evidence was admissible, and sufficient, on the issue joined, as to the identity of the person. *Renoard v. Noble*, 2 *Johns. Cas.* 293.

In an action of ejectment for a lot in the military tract on the demise of *P. S.* the plaintiff produced in evidence a patent to *P. S.* issued in pursuance of Stat. in *New York*. The defendant proved that there was another person of the name of *P. S.* in existence, who was too young, during the revolutionary war, to be a soldier, and the lessor of the plaintiff had not himself been a soldier during that war; and it was held upon this evidence, that the defendant was entitled to judgment. *Jackson ex. d. Shulze et al. v. Goes*, 13 *Johns. Rep.* 518.—*Am. Ed.*

(f) A will must be judged of *ex visceribus suis*, and where there is neither *latent* nor *patent* ambiguity, extrinsic evidence shall not be received. *Duncan v. Duncan et al.* 2 *Yeates' Rep.* 302. *Mann et al. v. Mann et al.* 1 *Johns. Ch. Rep.* 321; and confirmed in Error, 14 *Johns. Rep.* 1.

Parol evidence is inadmissible to explain, vary, or enlarge the words of a will, except in the case of a latent ambiguity, or to rebut a resulting trust. *Mann et al. v. The exr. of Mann et al.* 1 *Johns. Ch. Cas.* 231; and confirmed on appeal. 14 *Johns. Rep.* 1.

A latent ambiguity may be explained by parol. *Peisch v. Dickson*, 1 *Mason's Rep.* 10.

* *Thomas dem. Evans v. Thomas*, 6 *T. Rep.* 671. The testator, after several devises, proceeded thus: Item, I give to my four daughters, *Margaret, Anne, Mary, and Elizabeth*, one shilling each: item, I give to my grand-children of *Llanerway, Anne, Elizabeth, and Elmor*, 40l. each: item, I give to my grand-

Chap. II. v. 5. cases, the heir's objection arose from parol evidence, and therefore parol evidence ought to be received to answer it. So if a man having two manors called *Dale*, levy a fine of the manor of *Dale*, (1) without further description, circumstances may be given in evidence to prove which manor was intended, for this is not to contradict the record, but to support it. (2) And, in like manner, where a man having a house in *London*, and also wine vaults under a yard belonging to it, which wine vaults

Ambiguities,
latent.

(1) Roll.
Abr. 676.

(2) Doe dem.
Freeland v.
Bart,
1 T. Rep. 701.

Parol evidence is not admissible to shew that a scrivener in drawing a will, inserted words of the meaning of which he was ignorant, in order to vary the effect of its dispositions although it may be received to explain a *latent ambiguity*, or to *rebut a resulting trust*, or in case of *fraud or mistake*, to annul the will. *Iddings et al. v. Iddings*, 7 Serg. & R. Rep. 111.

It seems, the rule allowing parol evidence in regard to written instruments, ought rather to be restrained than extended. *ibid.*

Parol evidence is not admissible to shew the inadequacy of the personal estate of the testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will. *Jones v. Curry*, 1 Swanston's Ch. Rep. 66.

Parol evidence is admissible to prove that a legacy, given to *Samuel P.* was intended for *William P.* though there were persons of both names. *Powell v. Bidelle*, 2 Dall. Rep. 70.

So if there be a devise of a lot "on *Third-street*, in the occupation of *J. S.*" and the lot lies on *Fourth-street*, and was in the occupation of *J. S.* this is a latent ambiguity, and may be explained by parol evidence. *Les. of Allen v. Lyons*, C. C. Jan. 1811, *M. S. Rep.*

A patent was granted to *David H.* and parol evidence was admitted to shew that *Daniel H.* was intended. *Jackson ex. d. Dickson et al. v. Stanley*, 10 Johns. Rep. 133. *Ex vide Jackson ex. d. Shulz et al. v. Goes*, 13 Do. 513. *Sed vide Jackson ex. d. Houseman v. Hart*, 12 Do. 77.

Parol evidence of the testator's circumstances, and connection with the legatees, between the making of his will and death, may be admitted to discover his intention. *Shelton's exrs. v. Shelton*, 1 Wash. Rep. 69.

Where the words in a will are susceptible of reference to two objects, viz. a freehold in the lands or rents, which had previously accrued, parol evidence may be admitted to shew to which they apply. *Elsworth v. Buckmeyer*, 1 Nott & M. Cord's Rep. 431.—AK. Ed.

daughter, *Elinor Evans*, of *Merthyr* parish, 40l.: item, I devise to my GRAND-DAUGHTER, *Mary Thomas*, of *LEECHLOYD IN MERTHYR PARISH*, the reversion of the house in *Water-street*, &c. At the time of his death, the deviser had a granddaughter named *Elinor Evans*, who lived in *LEECHLOYD* in *Merthyr* parish, and a great-grand-daughter, *Mary Thomas*, an infant of about the age of two years, the grand-daughter of his eldest daughter, *Margaret*, by her second husband, *John Thomas*, being the only person of that name in the family; but it appeared that she lived at *Greencastle*, in the parish of *Llangain*, some miles from *Merthyr* parish, in which latter parish she had never been in her life. At the trial, the plaintiff's counsel proposed giving parol evidence, to shew a mistake in the name of the devisee, that, when the will was read over to the deviser by a Mr. *Phillips*, who drew it, and who is since dead, the deviser said that there was a mistake in the name of the woman to whom the house was given; that *Phillips* then said he would rectify it, but the deviser answered there was no occasion, as the place of abode and the parish would be sufficient. To this evidence the defendant's counsel objected, contending, that there

were in the occupation of *B.* and held as a distinct tenement, demised part of the house and the yard, by the description of "one room on the ground floor, and a cellar thereunder, and a vault contiguous and adjoining thereto, together with the ground whereon the same now stand, and together with a piece of ground on the north side, (being the yard) in the occupation of *A.*" he was not estopped by the deed from shewing that the vaults under the yard were a distinct tenement, and not included in the deed, though *prima facie* the property in the vault would pass by such a demise.

In the cases cited above, of two estates or two persons of the same name, or a mistake in the name of the devisee, we may observe that the words used in the instrument were clear in themselves, but that the extrinsic circumstances introduced by

was not that *ambiguitas latens* which authorised the receiving of parol evidence. But LAWRENCE J. received it, subject to the opinion of the Court, as to its admissibility, in case the jury should be of opinion that the name *Mary Thomas* had by mistake been inserted instead of *Elinor Evans*; but the jury being of opinion that there was no such mistake, they were directed to find for the defendant on the first count, which they accordingly did, and consequently any further consideration on this point became unnecessary. The defendant's counsel then offered evidence of the declarations, made by the deviser at other times previous to the making his will, expressive of his regard for his great-grand-daughter, and of his intention of giving her the premises in question. This evidence was rejected by the learned Judge, who thought that nothing *dehors* the will could be received to show the intention of the deviser, which could only be collected from the words of the will itself, after the removal of any latent ambiguity there might be in the description of persons, or other terms made use of in the will; and the jury, under his direction, found for the plaintiff in the several counts on the demises of the heirs at law, on the ground that the devise was void for uncertainty, giving the defendant leave to move to enter a nonsuit. A motion was made accordingly, but the rule discharged, on the ground that the parol evidence which was properly admitted, raised the uncertainty, and that that uncertainty could not be removed by declarations made by the testator long before the making the will. But Lord KENTON there said, that had these declarations been made at the time of making the will, he should have thought they ought to have been received in evidence. So where a testator after several remainders devised to *G. H.* eldest son of *A.* and his children, in strict settlement, and in default of issue of the children of *J. H.* to the third son of *A.* with the like limitations, parol evidence was admitted of the state and circumstances of the testator's family, and it was held, that upon such evidence being given, it became a question of fact for the jury, whether the mistake was in the name or the description? *Doe d. Chevalier v. Hultwaite*, 3 Barn. & Ald. 632.

In *Lord Walpole v. The Earl of Cholmondeley*, 1 T. Rep. 138, the testator had made a will in 1752, and another in 1756, without disposing of his personality: By a codicil, (reciting that by his last will dated in 1752, he had made no disposition of his personality,) he disposed thereof, and appointed executors; it was ruled that there was no such latent ambiguity, as to let in parol evidence to shew that the testator intended by the codicil to confirm the will of 1756, and not to re-publish that in 1752; and that will was therefore determined to be a subsisting will at the time of his death.

Chap. II. s. 5.
Ambiguities,
latent.

Chap. II. s. 5
Ambiguities,
lat. nt.

Bacon's Max-
ims, 77.

(1) White-
head v. May,
2 Bos. & Pul.
595.

(2) Doe dem.
Chichester v.
Oxendon, 3
Taunt. 147.

(3) Doe dem.
Browne v.
Greening, 3
Mau. & Sel.
175.

evidence rendered the meaning so uncertain, as to deprive the instrument of any operation whatever, and therefore further evidence was admitted for the purpose of preventing it from being wholly inoperative. But where the extrinsic circumstances do not go to that extent, and there is, notwithstanding, the doubt they create a sufficient estate to satisfy the words of the instrument according to one meaning of the description, collateral evidence is not admissible to shew that the grantor or testator meant to use the description in a more extended sense. Lord

BACON commenting on the maxim "*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*," says, "If I have some land wherein all these demonstrations are true, and some wherein part are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all the circumstances are true." Several cases, some in ancient times and others of more recent date, have occurred on this point; and as the latter have undergone much discussion, I shall only refer to them. In one(1) a testator devised his "estate at *Leeshill*, in the county of *Wilts*, and *Hearne*, and *Buckland*, in the County of *Kent*." At the time of making his will he had lands in *Hearne* and other parishes in *Kent*, which he had purchased at the same time. It was proposed on the part of the devisee to prove that the testator used to call all the land by the general description of his *Hearn Estate*, and that he had sold *Buckland* before his death, and this for the purpose of shewing that he meant the lands in the other parishes to pass. The Court of Common Pleas was divided on the question, whether this evidence was admissible? but, on a writ of error, the House of Lords decided it was not. In a subsequent case,(2) the testator devised his "estate of *Ashton*," and it being proved that he having a maternal estate, comprehending a manor, capital farm, and lands in that parish, and several other estates; some in the adjacent parishes, and some ten and fifteen miles distant, evidence was offered to prove that he was accustomed to call all his maternal estate by the general description of his "*Ashton Estate*," for the purpose of raising an inference that he meant to devise the whole by that name; but, on solemn argument, it was held, that this evidence was inadmissible. Again,(3) where the testator devised "all the estate and interest which he had or could claim either in possession or reversion of or in any lands, tenements or hereditaments at *Coscomb*;" it was holden, that evidence was not admissible to shew that another estate, not at *Coscomb*, was formerly united, and had been ever since enjoyed with the estate at *Coscomb*, for

the purpose of proving that such estate passed under the devise. Chap. II. s. 5. In another case, (1) a person being seised of a messuage and lands in a parish, and of a messuage and lands in the hamlets of *B.* and *C.* in the same parish, which he had purchased of *A.* let the whole to a tenant at one entire rent; and having other lands allotted to him under an inclosure Act, in lieu of all other lands, except two acres and a messuage, which remained as before, all which the tenant continued to hold at the same rent, devised "all his messuage, farm, lands and premises, with the appurtenances, situate in the hamlet of *B.* which he had lately purchased of *A.*;" and in this instance also the Court held that the lands in the hamlet of *C.* did not pass, and that evidence *dehors* the will (viz. a notice to quit, describing all the premises as in *C.*) to shew that he intended to pass all the lands which he purchased of *A.* was inadmissible. Again, (2) where a testator devised to his wife all his wines for housekeeping, in addition to the settlement he made her upon his *copyhold* estate; and to *A.* the rents and profits of his new inclosed *freehold* cow pasture close, in *North Collingham*, during his life; and then to two nephews all his personal estate, to be divided, &c.; and after the decease of his wife, he devised to the same two nephews all his furniture, plate, &c. and all his *copyhold* estate in *North and South Collingham*, and all other his personal estate, to sell and divide among his nephews and nieces:" in this case also the Court held, that extrinsic evidence could not be received; that the settlement on the wife included a certain *freehold* close mistakenly there enumerated as one of several *copyhold* closes settled, the bounds of which were no longer distinguishable from those of the freehold, for the purpose of shewing, that by the devise of all his *copyhold* estate, after his wife's decease, the *freehold* close in question passed as part of the real estate in settlement on his wife. The Court also held, that as the settlement was not evidence, so neither were other instruments and papers not referred to in the will; as 1st. A bond of the same date as the settlement, and in aid of it, speaking only of copyhold to be settled; 2dly. The rough draft of the settlement altered by the testator; 3dly. A book endorsed "*Collingham Estate Survey*," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and 4thly. A rental kept in the same place, on which was endorsed by the testator, that all the rents of the copyhold lands in *North and South Collingham*, were settled on his wife for life. The reason assigned for this last decision was,

Ambiguities, latent.

(1) Doe dem. Tyrell v. Lyford, 4 M. & S. 550.

(2) Doe dem. Brand v. Brown, 11 East, 441.

Chap. II. s. 5. that there was no ambiguity on the face of the will, the testator having estates in *North and South Collingham*, to answer the description in it; nor was there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife, and there was no such necessary connection.

There is another class of cases which must be distinguished from the preceding, not so much on the subject of admissibility of evidence, as on the construction of the instrument itself. The cases last cited are those where there was one description of the thing granted or devised, which it was necessary to take altogether for the purpose of its construction. Those now under consideration are, where there is a sufficiently clear description at first, but some unnecessary words are afterwards added.^(g) The distinction which has been made between these two descriptions of cases is this, viz. "where the grant is in *general terms*, the addition of a particular circumstance will operate by way of restriction, and modification, but where there is a grant of a *particular thing* once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it, will not frustrate the grant;"⁽¹⁾ or, as it has been rather more quaintly, though not less intelligibly, expressed, that "the sentence being perfect before, the subsequent words shall be taken as words of suggestion and affirmation, and not of restriction or limitation."⁽²⁾ Thus, where a grant was made of all tithes belonging or appertaining to the grantor within a particular parish, and then followed "all which were lately in the possession of *Margaret Peto*, widow, deceased;" all the tithes within the rectory were holden to pass, though none of them had been in the possession of *Margaret Peto*.⁽³⁾ So where a testator devised all his farm called *Trogues Farm*, in the occupation of *A. C.*; and it appeared that only part of the land so called was in such occupation, it was holden that the rest of the land passed; and evidence was admitted of a notice to quit, given to a third person, who held part of the lands, of which the lands so holden were described as part of and belonging to *Trogues Farm*.⁽⁴⁾ In another case,⁽⁵⁾ the testator devised all her "*Britton Ferry* estate, and all the manors, &c.

(1) *Roe dem. Connolly v. Vernon*, 5 East, 51.

(2) Roll. Abr. 52, pl. 26.

(3) *Vicars Choral of Litchfield v. Ayres and others*, Ibid. Sir T. Jones, 455.

(4) *Goodtitle dem. Radford v. Southern*, 1 M. & S. 229.

(5) *Doe dem. Beach v. Lord* this is not to be construed as a stipulation or condition, rendering the whole dependent on that circumstance. *Manly v. The Un. M. & Fire Ins. Co.* 9 Mass. Rep. 85. & Ald. 550.

It is a general rule that general words in an instrument, shall be restrained by particular expressions in it. *Lyman v. Clark et al.* 9 Mass. Rep. 235. *Bott v. Burnell*, 11 Do. 163.—AM. ED.

thereto belonging, and of which the same consisted with the appurtenances; and afterwards devised to another person another estate, adding, "which as well as my *Britton Ferry* estate, is situate in the County of *G.*;" and the Court held, that the latter words did not restrain the former general devise of the *Britton Ferry* estate, but that all land known by that description passed, though locally situate in another county. In this latter case it was strongly contended, that even without the subsequent words, "in the County of *G.*" the words "*Britton Ferry* estate" necessarily confined the devise to such land, as was within the parish of *Britton Ferry*, and were in effect the same as "my estate of *Ashton*," which was the expression in *Chichester v. Oxendon*; but the Court held otherwise, saying, that the words "*Britton Ferry* estate," was a description by name, whereas the words "estate of *Ashton*," was description by place.

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Ambiguities,
latent.

Ante, 182.

By the established rules of all Courts, whether of legal or equitable jurisdiction, some facts are presumed, though not expressly proved; but as such presumptions only prevail when there is no evidence to rebut them, we have before seen that very slight evidence will be sufficient for that purpose; and though these presumptions arise from the usual construction of a deed, or other written instrument, yet evidence will be received for the purpose of shewing that the general presumption is not applicable in the particular instance.^(h) Therefore where *A.* devised 400*l.* to his wife, and made her executrix without disposing of the surplus, Lord Chancellor HARDWICKE admitted parol evidence to shew that the intention of the testator was, that his wife should have it; for there was no ambiguity in the will, nor was it to alter the apparent intention of the testator. By law she was entitled to the surplus as executrix, and therefore the evidence was admitted only to rebut the rule of Equity, which, in such cases, divides the residue amongst the next of kin, contrary to the general rule of law. But in *Brown v. Selwyn*, the testator having expressly devised the residue to both his executors, one of whom owed him money on a bond, parol evidence that the testator meant to extinguish the bond debt was rejected, because that would have been to have altered the apparent intent, and not simply to have rebutted an equity.

Lake v. Lake,
Bul. N.P. 297.

Cas. Temp.
Talbot. 240.
S. C.

In like manner, when a man levies a fine, and no deed is made to declare the use, the law presumes that he did it only to secure his estate, and it enures to his own use; but parol evi-

Altham v.
Earl of Anglesea,
Gilb. Cas.
16. Roe &
Popham,
Doug. 2

(h) Vide ante, p. 47, n. p.—A. E. D.

Chap. II. s. 5.
Ambiguities,
patent.

dence has been admitted to rebut this presumption, and vest the estate in the devisee; though by the Statute of Frauds uses to third persons must be declared by writing, signed by the party. So where a man makes his will, and afterwards marries and has a child, the law *presuming* that no one would, in such circumstances, wish his will made before marriage to stand, considers it as revoked, or more correctly speaking (as Lord Kenyon said in *Lancashire v. Lancashire*(1),) it presumes a tacit intention, when a man first makes his will, that it shall not stand in such case; this presumption, it has been held,(2) may be rebutted by parol evidence, though it could not be enforced by it.(3) But where a man, after having made a will, executes deeds, by which he takes a new estate, parol evidence cannot be received to shew that the testator meant his will to continue, because the will is not revoked on the ground of intention, but by the Statute of wills could never operate on any estate acquired after it was made.

(1) 5 T.R. 49.

(2) Brady
dem. Norris
v. Cubit,
Doug. 31.
Sed. Qu.
Vide post.

(3) Doe dem.
Lancashire v.
Lancashire,
5 T. Rep. 49.
Goodtitle
dem. Holford
and others v.
Otway, 2 H.
Black. 516.
Bacon's Ele-
ments, 82.

The *ambiguitas patens*, viz. that which arises on the face of the deed or will itself, is (it is said) never helped by averment or parol evidence; for, says Lord Bacon, that were in effect to make that pass without deed, which the law appoints shall not pass but by deed. It is necessary for us to attend carefully to this reason, to enable us to distinguish between cases which will otherwise seem to clash with each other; for though it is generally true that in cases where nothing would pass by parol no evidence of an *expressed intention* can be received to explain an ambiguity on the face of the instrument, and thereby to make that valid which of itself would not avail; yet I conceive that in other cases, both species of ambiguity are open to explanation by parol evidence. Thus, if in a case where no written contract is required, the parties execute a written paper, containing merely the general heads or minutes of an agreement, parol evidence, not inconsistent with the writing, is allowed, for the purpose of enabling a Court of Justice to put a construction upon it. This occurs daily in the case of policies of insurance and other mercantile contracts, where the usage of a particular trade is received as explanatory of the written instrument.(4) (i)

(4) Chaumond
v. Angerstein,
Peck. N. P.
Cas. 43.

(i) A usage proved may give a peculiar effect and meaning to the words of the contract necessarily referring it. *Murray v. Hutch*, 6 Mass. Rep. 465. *Homer v. Dorr*, 10 Do 26.

In an action against the owners of a vessel, for a quantity of gold and silver coin, taken by the master at *Nevis*, on freight, evidence of a custom of merchants in *Connecticut* and *New York*, that the freight of money received by the master is his per-

So where a conveyance, which take its operation from the Statute of Uses, has in the granting part all the necessary formalities to give it effect, but the consideration is not particularly expressed, (the deed only stating divers good causes and considerations(1),) the grantee may prove the consideration actually paid; and, in like manner, if money be the only consideration stated on the deed, it may be shewn that a marriage between the parties also formed part of the consideration;

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Ambiguities,
patent.

(1) Shep.
Touch. 222.
510.

quisite, and that he is to be personally liable on the contract, and not the owners, was held to be admissible. *Halsey v. Brown et al.* 3 *Day's Rep.* 346.

The usage of no class of citizens can be sustained in opposition to the established principles of law. *Murray v. Hatch*, 6 *Mass. Rep.* 465 *Homer v. Derr*, 10 *Do.* 26. *Schieffelin v. Harvey*, *Anth. N. P.* 57. *Bowen v. Jackson*, *C. C. Penn. April*, 1807, *M. S.* Et vide *Henry exr. v. Risk et al.* 1 *Dall. Rep.* 265.

A commercial usage will be considered as established a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it. *Smith et al. v. Wright*, 1 *Caines' Rep.* 43.

Usage of trade generally inadmissible to shew that a transaction was not usurious. *Dunham v. Dey*, 13 *Johns. Rep.* 40.

Where the law is doubtful, evidence of a usage to explain some clause in a policy, is proper; but opinions as to the construction are not evidence. *Winthrop v. Union Ins. Co. C. C. Penn. April*, 1807, *M. S. Rep.*

In an action on a policy of insurance, the usage of trade may be proved by parol evidence, although it originated in a written law or usage of the government of the country where it prevails. *Livingston et al. v. Maryl. Ins. Co.* 7 *Cranch's Rep.* 539.

In an action on a note payable "in cotton yarn at the wholesale factory price," it was held that evidence of the usage of dealers in that article, was admissible to shew that a certain scale of prices different from the actual wholesale prices was intended. *Avery et al. v. Stewart et al.* 2 *Con. Rep.* 69.

Where no records of the Court of Sessions could be found appropriating apartments as a jail, immemorial usage was received as sufficient evidence of such appropriation. *Clap adm. v. Cafran*, 7 *Mass. Rep.* 93.

A stockholder who borrows money of a bank, with full knowledge of a usage not to permit a transfer of stock, while the holder is indebted to the bank, is bound by such usage, and neither he nor his assignees under a voluntary assignment, can maintain an action against the bank, for refusing to permit his stock to be transferred. *Morgan et al. assignees v. The Bank of North America*, 3 *Serg. & R. Rep.* 73.

Evidence of the usage of sportsmen is admissible. *Morgan v. Richards*, 1 *Browne's Rep.* 171.

Where the custom of a country or a particular place is established, it may enter into the body of a contract, without being inserted. *Stultz v. Dickey*, 5 *Binn. Rep.* 227.

Evidence of a custom, different from the law, in a particular place to re-enter for a forfeiture incurred for the non-payment of rent, is not admissible. *Stoeck v. Lee. of Whitman*, 6 *Binn. Rep.* 416.

In an action against a common carrier by water, to recover damages for the loss of the plaintiff's goods, where the defence is, that carriers by water are, by the custom of the country, answerable for such losses only, as are occasioned only by their own negligence, the defendant cannot give evidence that in a case in which the

Chap. II. s. 3. for this stands with the deed, and is not contradictory of it. (1)(k) Ambiguities, So where a conveyance was said to be in consideration of 28*l.* patent.

_____ a parish, on a question of settlement, was permitted to shew (1) 1 Co. 176. a. that 30*l.* was the sum actually paid. (2) On the contrary, in (2) *Rex v. Inhabitants of Scammonden*, 3 T. Rep. 474. what the contract is, so as to enable a Court of Justice to put a Vide post. construction upon it, without the aid of parol testimony, the Part II. c. 1. whole is a nullity; for the admission of parol testimony in this and Part II. c. 1. s. 1. case, to support a contract not valid in itself, would be attended with all the mischief which the Statute was calculated to prevent.

plaintiff had carried the property of others, he had refused to make compensation for a loss. *Dean v. Swoop*, 2 Binn. Rep. 79.

But a usage or custom varying the liability of common carriers by water, from that of the common law, may be proved. *Gordon et al. v. Little*, 3 Serg. & R. Rep. 533.

Evidence of usage or custom, fixing the construction of the words "*inevitable dangers of the river*," in a bill of lading for the transportation of goods by inland navigation, is admissible. *ibid.*

Where a usage is so established as to leave no reasonable doubt of its existence, it becomes a part of the law, and the Court will decide on it, without requiring it to be again proved. *Consequa v. Willing et al.* 1 Peters' Rep. 225.

A custom of merchants is a matter of fact, and must be proved when first brought into Court. But when legal decisions are made on it, it becomes the law of the land, and all persons and Courts are to notice without stating it. *Brunsh v. Burnley*, 1 Call's Rep. 147.

A commercial usage generally known, is evidence of the intention of the parties, in the transaction to which that custom is applicable. *Barber v. Brace et al.* 3 Con. Rep. 9.

The usages of a bank, at which the parties to a promissory note are accustomed to transact business, respecting the time of demand and notice on such notes, may be proved, not as forming rules for the decision of the Court, but as evidence of the assent of the parties to such usage, and of their waiving their legal claims. *Blanchard v. Hilliard*, 11 Mass. Rep. 85.

Et vide *The Hartford Bank v. Stedham et al.* 3 Con. Rep. 489.—AM. ED.

(k) In a note to *Soule v. Soule et al.* 5 Mass. Rep. 67, PARKER J. said "that if the parties had not expressly agreed that *no valuable consideration* had been paid, it would have been difficult to get over the express averments of the deed."

In the case of *Quarles et al. v. Quarles*, 4 Mass. Rep. 680, it was decided that where one consideration is expressed in a deed, any other consideration consistent with the one expressed, may be averred and proved. Et vide *Storer v. Batson*, 8 Do. 443.

And in *Wilkinson v. Scott*, 17 Do. 240, "that a man is estopped by his deed to deny that he granted or that he had a good title to the estate conveyed; but he is not bound by the *consideration* expressed; because that is known to be arbitrary, and is frequently different from the real consideration of the bargain. It is so, we think, also with regard to the acknowledgment of payment."

In the case of *Steele v. Adams*, 1 Greenl. Rep. 1, it was held that if one, in consideration of a sum of money, bargain and sell land, and in the deed or conveyance

In the case of a will where the devisee's name was totally omitted, parol evidence to shew who was meant, was rejected; (1) but where a clerk was presented to a church, and instituted, and a blank left in the bishop's register for the name of the patron, this omission was permitted to be supplied by parol testimony, (2) for the presentation might have been by parol, and therefore it was not in effect to make that pass by parol which

Ch. II. s. 5.
Ambiguities,
patent.

(1) *Ballis and Church v. Attorney General*, Bul. N. P. 298.
2 Atk. 240.
S. C.

acknowledge the receipt of the purchase money when in truth no money was paid, yet the bargainor is estopped by the deed to say to the contrary.

So an account that the sum stated in the condition of a bond, was erroneously inserted for another sum, is inadmissible. *U. States v. Thompson et al.* 1 Gallis. Rep. 388.

(2) *Bishop of Meath v. Lord Belfield*, 1 Wils. 215

Where a deed is executed to more persons than one, without designating the proportions they are to hold, the considerations paid by the several grantees cannot be inquired into by parol, to shew that they are entitled to different proportions. *Treadwell et al. v. Bulkley et al.* 4 Day's Rep. 395.

A deed from a parent to his child, in consideration of love and affection, is presumed to be an advancement. *Hatch et al. v. Straight*, 3 Con. Rep. 31.

If a deed, after mentioning a specific consideration, adds, "and for other considerations," it seems that parol evidence is admissible to shew what those considerations were. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370.

A deed in Equity may be proved to have been made in consideration of marriage, though not so expressed on its face. *Eppes et al. v. Randolph*, 2 Call's Rep. 125.

So likewise, either party may aver and prove a consideration different from that stated in a deed, but not to the prejudice of a bona fide purchaser without notice. *Duval v. Bibb*, 4 Hen. & M. Rep. 113.

Where a deed is made in consideration "of natural love and affection" and "of one dollar," parol proof may be admitted of other valuable considerations. *Harvey v. Alexander*, 1 Randolph's Rep. 219.

In *Garret v. Stewart*, 1 McCord's Rep. 514, it is said, that at Law you cannot shew by parol testimony a different consideration from that expressed in the deed, but you may a greater or less of the same character. *Sed quere*.

Parol evidence is admissible in Equity to shew that the consideration money was not paid by the grantee. *Robertson's ex'rs. v. Maclin*, 3 Hayw. Rep. 70.

In North Carolina, where the deed contains an acknowledgment by the bargainor of the receipt of the consideration money, parol evidence cannot be received to shew it unpaid. *Brocket v. Foscue*, 1 Ruffin. Rep. 64.

Where a consideration is set forth in a written contract, evidence to shew a greater or different consideration, is inadmissible. *Schermerhorn v. Vanderheyden*, 1 Johns. Rep. 139.

In *Kip ad'r. v. Deniston*, 4 Do. 23, the Court held, that where two trustees had executed a conveyance of land, in which was contained a joint acknowledgment of the receipt of the consideration money, it was competent for one of the trustees to shew that the whole of the money went into the hands of the other, and thus exonerate himself from liability.

In *Maugley v. Hauer*, 7 Do. 341, parol evidence of a consideration of a different nature from that expressed in a deed of conveyance, was refused.

In *Shephard v. Little*, 14 Do. 210, it was decided, that where the consideration money for a conveyance was expressed therein to have been paid by the grantee or his assignee, parol evidence is admissible to shew that it had not been paid. *Sed quere*.

In *Bowen v. Bell*, 20 Do. 338, parol evidence was admitted to shew that the con-

Ch. II. s. 5. the law requires to be done by writing, as would have been the case if the like evidence had been admitted to supply the blank left in the will.(l)

But Courts of Justice are in all cases extremely cautious in admitting parol evidence to supply or explain a written instrument.(m) It never ought to be suffered to explain away or contradict an explicit agreement, for that is in effect to vary it;

Preston v. Merceau,
Ibid.

consideration money expressed in a deed to have been received by the grantor, had not been paid by the grantee.

In *Maryland*, in the case of *Oncale v. Lodge*, 3 Bar. & M'Hen. Rep. 433, in an action of covenant for the sale of land, the Court refused to instruct the jury that a deed with a receipt endorsed thereon was conclusive evidence of payment.

But in the case of *Dixon v. Swiggett*, 1 Bar. & Johns. Rep. 853, in an action of assumpsit for the price of land, the Court decided that parol evidence could not be given to prove the non-payment of the consideration money, contrary to the express acknowledgment on the face of the deed.

In *Pennsylvania*, in the case of *Wills v. Franklin*, 1 Binn. Rep. 502, TILGHMAN C. J. says, that in the case of *Fisher v. Smith*, *Moer's Rep.* 569, it was said by the whole Court that if a consideration of money be expressed in a deed of bargain and sale, there shall be no averment or evidence to the contrary. "I adopt this principle so far as to support the formal part of a conveyance; to go farther is not necessary." But the case of *Oncale v. Lodge*, is cited by the Court with approbation, in the case of *Hamilton v. The executors of M'Guire*, 3 Serg. & E. Rep. 355, and it was there decided that the acknowledgment of the payment of the purchase money in the body of a deed, and a receipt endorsed, are not conclusive evidence of such payment, nor a bar to a suit for the same. So in *Jordan v. Cooper et al.* *ibid.* 564.; and in *Wiegley's adm. v. Weir*, 7 Do. 300. It never has been doubted that equity was a part of the law in *Pennsylvania*, and at an early period of our judicial history it was decided, in the case of *Pollard v. Shaffer*, 1 Dall. Rep. 110, that the defendant might file a plea to a case, founded entirely upon equity. And although the Courts have never departed altogether from the forms of law, yet in many cases they have been relaxed in order to reach the equity of the case. The decisions, therefore, which have taken place to warrant an averment to contradict the terms of a written instrument, are not innovations upon the principles of law, but arise from the peculiar adaptation of equity and law in the same tribunal.

(l) In an action brought for not giving an order on — according to an award of referees, it was ruled that parol evidence was admissible to shew who was the person intended by them. *Lynn v. Risberg*, 2 Dall. Rep. 180.

So to prove that money granted by a parish, was for a different purpose than expressed in the parish records. *Bangs v. Snow et al.* 1 Mass. Rep. 181.—AM. Ed.

(m) Where there is no ambiguity in articles of agreement, and no doubt can be entertained of the operation of the instrument, parol evidence of the intention of the parties according with their legal operation, shall not be received. *Little v. Henderson et al.* 2 Yeates' Rep. 295. Et vide *Stackpole v. Arnold*, 11 Mass. Rep. 27. *Barber v. Prentiss*, 6 Do. 430. *Murray v. Hatch*, *ibid.* 465. *Hunt adm. v. Adams*, *ibid.* 519, and 7 Do. 518. *Richards v. Kilham*, 10 Do. 239.

In the case of *Davenport v. Mason*, 15 Mass. Rep. 35, it was decided that where a deed conveying lands contains nothing touching the consideration, or the payment of the purchase money; although the law will presume that payment was made, yet this presumption being a species of evidence, relating to matter of fact, and not arising from the construction of the deed, may be repelled by oral testimony.—AM. Ed.

and therefore where there was an agreement for a lease of twenty-one years, at 26*l.* per annum, the lessor was not permitted to prove that the lessee was also to pay a sum of 2*l.* 12*s.* 6*d.* a year to the ground landlord; but it was said, in this case, that collateral matters, about which the agreement was silent, as that the landlord was to repair, or the like, might be supplied by parol evidence. So where an agreement was made between two persons in the following words: "I, *J. M.* do hereby agree with *J. C.* to serve me three years to learn the business of a carpenter: the first year to have 1*s.* 2*d.* per day, the second year 1*s.* 6*d.* per day, the third year 1*s.* 10*d.* per day, as witness my hand;" which agreement was signed by both parties; it was held to be competent to a parish, when *J. C.*'s settlement came in question, to prove by parol that at the time of signing the agreement, *J. C.* agreed to give *J. M.* three guineas, and that he was not to be, and in fact never was employed in any other work than that of a carpenter; for this evidence did not contradict the agreement, but was given to ascertain a fact collateral to it, in order to explain the intention of the parties; the instrument being in some measure equivocal whether he was to be an apprentice or a servant.

Ch. II. s. 5.
Ambiguities,
patent.

*Rex v. Inhabitants of
Laindon*,
8 T. Rep. 379.

Ibid. 384. Per
Lawrence, J.

Another distinction may also be made as to the *ambiguitas patens*, and that is in the case of ancient instruments; for if doubts arise as to the construction and meaning of them, the uniform usage which has prevailed under them is received as evidence of the original intention of the parties.⁽ⁿ⁾ Lord Coke, in one place, says, that *contemporanea expositio est fortissima in lege*, but it is plain that this was said only with reference to the opinions and writings of contemporary lawyers on an ancient Statute, and not as to the usage of the parties; but in another place speaking of claims under old charters before Justices in Eyre, he says, "If the words were general, and a continual possession pleaded of the franchises claimed; or if the claim were by *old and obscure words*, and the party, in pleading them, expounding them to the Court, and *averring continual possession according to that exposition*, the entry was *inquiratur super pos-*

(n) Where the words in an ancient deed are equivocal, the usage of the parties under it, is admissible to explain them. *Livingston v. Ten Broeck*, 16 Johns. Rep. 14. *Jackson ex. d. White v. Cary*, *ibid.* 302.

Evidence of usage is inadmissible to explain the language of a deed not ambiguous. *Cortelyou v. Van Brundt*, 2 Johns. Rep. 357.

In patents of great antiquity, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. *Jackson ex. d. Schenck v. Wood*, 13 Johns. Rep. 346.—AM. ED.

Ch. II. s. 5.
Ambiguities,
patent.

sessionem et usum, which, he adds, I have observed in divers records of those Eyres according to the old rule *optimus interpret rerum usus*; and it is said by the Court in *Vaughan*, 169, that "where the penning of a Statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written, must be, as it hath constantly been received to be, by common acceptance."

The first instance, however, which I find of this doctrine having been acted upon, is in the case of the *Attorney General v. Parker*,⁽¹⁾ where the right of election being given by a deed founding a charity, to *parishioners* and *inhabitants*, Lord HARDWICKE admitted evidence of the usage for all *housekeepers* to vote, as explanatory of the words *parishioners* and *inhabitants*. The same kind of evidence has been received in many subse-

(1) 3 Atk.
576.

(2) *Blankley v. Winstanley*
3 T. Rep. 279
Gape v. Handley, *Ibid.* 288.
Rex v. Bell-ringer,
4 T. Rep. 810.
Rex v. Varlo,
Cowp. 248.

(3) *Whitnall v. Gartham*,
6 T. Rep. 338.
Vale also *Rex v. Osborne*,
4 East, 327.

(4) *Cooke v. Booth*,
Cowp. 819.

(5) *Baynham v. Guy's Hospital*, 3 Ves.
jun. 295.

(6) *Moore v. Foley*, 6 Ves.
jun. 232.

(7) *Iggulden v. May*, 9 Ves.
jun. 325.

(8) Same parties, 7 East.
237.

quent cases⁽²⁾ depending on the construction of charters, and in the last which occurred,⁽³⁾ the usage was much relied on by the Court in forming their decision. In that case, Lord KENYON said, that both *private deeds* and the *King's charters* might be expounded by the usage which had taken place under them; and accordingly we find that on a question whether a covenant for renewal in a lease should be deemed to be a covenant for perpetual renewal, or only for one other lease,⁽⁴⁾ evidence of several former renewals was received as the construction which the parties themselves had put on the preceding leases, and of their intention at the time of granting that in question. The doctrine of this latter case, however, has been since questioned; and on a similar case⁽⁵⁾ coming before Lord ALVANLEY, when Master of the Rolls, his Lordship said he strongly protested against construing legal instruments by the equivocal act of the parties and their understanding: and the late Master of the Rolls, (Sir William GRANT) in a still later case of the same description, concurred with him in that opinion.⁽⁶⁾

In another case,⁽⁷⁾ which came before Lord ELDON, as Chancellor, his Lordship said, "he should state his opinion with great reserve. It was, that in no case would it be competent to bring upon the record the fact, with reference to the former leases, as explaining the contract contained in the last lease;" but as such evidence had been stated and relied on in the case of *Cooke v. Booth*, his Lordship retained the bill for twelve months, with liberty for the plaintiff to bring an action on the covenant. An action was accordingly brought in the Court of King's Bench,⁽⁸⁾ and the plaintiff averred in his declaration, that the covenants in the deed "corresponded with those expressed in *various* other leases before then successively made

and executed on renewals *from time to time* granted at the like yearly rent, and in consideration of the like sum paid in nature of a fine upon *any such renewal*." The construction of the deed, as affected by the former deeds, was argued at considerable length, on a demurrer to the defendant's plea. On the words of the covenant, the Court were of opinion there was no covenant for perpetual renewal. On the effect of the averment, Lord ELLENBOROUGH, in delivering the opinion of the Court, said, that though the case of *Cooke v. Booth* was very analogous to the present, yet there was a distinction between them. In that case the series of successive renewals, from the first downwards, was *uniform and unbroken*; whereas, in the present case, it was only alleged that the covenant corresponded with those in *various* other leases successively made; which allegation as to *various* other leases might be true, although there should have been several instances to the contrary. His Lordship added, that the fact stated respecting the successive renewals being so materially different, this case could not be governed by *Copke v. Booth*, even "if it were competent in *any* form of action to bring upon the record the fact with reference to former leases, as explaining the contract contained in the last lease," upon which point very great and serious doubts had been entertained, and which it was not necessary then to decide.

Chap. II. s. 5.
Ambiguities,
patent.

A writ of error was afterwards brought and the case argued in the Exchequer Chamber, when the judgment of the King's Bench was affirmed, and Lord C. J. MANSFIELD, in delivering the opinion of the Court, said, that the renewals which had taken place could not be used by way of argument on the occasion. It was true that similar renewals were allowed to operate upon the judgment of the Court in *Cooke v. Booth*, but that was the first time that the acts of parties to a deed were ever made use of in a Court of Law to assist the construction of a deed. Suppose the original lessor to have declared in the presence of fifty witnesses that he intended to bind himself by the lease to a perpetual renewal, his declaration could not have been allowed to alter the construction of the lease itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction?

2 Bos. & Pul.
N. R. 449

Cases of *fraud*, do not, as was observed before, fall within the principle on which parol evidence is rejected (o) and therefore

(o) The Circuit Court of the *U. States*, notwithstanding the restrictive clause in the Judiciary Act of 1789, c. 20. s. 11, has jurisdiction in a suit in Equity, brought by a judgment creditor against his debtor and others, (they being citizens of other

- Chap. II. s. 5. **Deed, fraudulent.** parol evidence may be produced to shew that an instrument was stated to the maker of it to be a different thing from what it really was ; as where a deed is falsely read to a grantor. So where a testator having made one will, afterwards made another, the provisions of which were widely different, parol evidence that the testator, at the time of the execution of the second will, inquired whether it was the same as the former, and was answered in the affirmative, was held to be admissible, for this did not go to contradict that which was allowed to be a valid instrument, but to set it aside altogether, as being obtained by fraud and imposition.(p)
- Doe dem. Small v. Allen, 8 T. Rep. 147.** So, though in general an averment shall not be allowed against a deed that there was no consideration given, when there is an express consideration stated upon the deed, yet where a deed was obtained under very suspicious circumstances, and appeared on the face of it to be made in consideration of a sum of money greatly inadequate to the value of the estate conveyed, and also of love and affection, an issue was directed to try whether love and affection did in fact form any part of the consideration, and being found in the negative, the deed was set aside: while, on the other hand, where a deed was made to two persons, one of whom was not related in blood to the grantor, and a money consideration was expressed on the face of the deed, the Master of the Rolls would not permit the grantors to show that love and affection also formed part of the consideration ; and Lord Mac-
- Filmer v. Gott, 7 Bro. Parl. Cas. 70.** CLESFIELD confirmed the decree. If a deed be founded on an usurious or other illegal consideration, this may be shewn, notwithstanding the deed on the face of it is perfectly fair and legal.(q)
- Clarkson v. Hanway, 2 P. Will. 903.**
- Vide B. N. P. 173.**

States) to set aside conveyances made in fraud of creditors, although the ground of the judgment was a negotiable *chase in action*, on which, before judgment, a suit could not have been maintained in such Court. *Bean v. Smith et al. 2 Mason's Rep. 252.—AM. Ed.*

(p) Parol evidence is admissible to contradict the return of an officer, which has been obtained by fraud. *Commonwealth v. Bullard, 9 Mass. Rep. 270.*

So to prove that fraud has been practised upon the party to be charged by a contract, &c. or some illegality in the transaction. *Stackpole v. Arnold, 11 Mass. Rep. 27. Barker v. Prentiss, 6 Do. 430. Storer v. Logan et al. 9 Do. 55. Ward v. Winship, 12 Do. 481.*

Quere, Whether in an action of ejectment, evidence is admissible that a patent was obtained by fraud. *Witherinton v. Mc Donald, 1 Hen. & Munf. 306.*

A patent obtained by misrepresentation, deceit, or forgery, or through ignorance of the facts by the officers of the land office, does not legalise an unauthorised survey. The adverse party may prove the fraud to obtain the patent. *Bond et al v. Seabold, 6 Serg. & R. Rep. 137. Et vide Gonzales et al. v. Hoover et al. ibid. 118.*

Whenever parol or extrinsic evidence would be received to reach a fraud in Chancery, it will be received in Pennsylvania. *Hill v. Ely, 5 Serg. & R. Rep. 365.—AM. Ed.*

(q) Vide ante, page 183, n. k.

CHAP. III.

OF PAROL EVIDENCE.

HAVING had occasion in the preceding chapters, to mention in what *cases* parol evidence was admissible; the principal object of our present inquiry will be, what *persons* are not permitted to give evidence, or privileged from examination, when unwilling to be called; to which I shall add, a few observations on the examination of witnesses.(a)

SECTION I.

Of persons incompetent to give evidence, by reason of the imbecility of their understandings.

ALL persons who are examined as witnesses, must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right or wrong. *Idiots and lunatics*, while under the influence of their malady, not possessing this share of understanding, are excluded; (b) as are also *children* of so early an age, as to be incapable of any sense of truth. As a general rule, fourteen is said to be the age at which

Ch. III. s. 1.
Idiots, &c.

Bal. N. P.
293.

Co. Litt. 6, b.
Gillb. Law.
Ev. 147.

(a) The rule of the text is recognised in the following cases, *Livingston v. Kiersted et al.* 10 Johns. Rep. 362. *Hartford v. Palmer*, 16 Do. 143. *Swift's Syst. of Evld.* 46.

Where insanity at a particular time is attempted to be proved, evidence of insanity *immediately before* or *after* the time will be received; but such evidence *long after* the time would not be admissible. *Dickinson v. Barber*, 9 Mass. Rep. 225.

In *Pennsylvania*, a negro slave cannot be a witness. *Respublica v. Bob*, 4 Dall. Rep. 143. n.

In *New York*, by Stat. ses. 36. c. 88. s. 19. 2 R. L. 207, no slave can be a witness, except in criminal cases, for or against a slave.

But a free black man is a witness to prove facts which may have happened while he was a slave. *Gurnee v. Dessies*, 1 Johns. Rep. 508.

A slave manumitted by an infant, although voidable, being in the mean time valid, the slave is a competent witness. *The exrs. of Rogers v. Berry*, 10 Johns. Rep. 132. AM. Ed.

(b) The lawfulness or unlawfulness of the mode by which evidence is obtained, does not affect its admissibility in a Court of Law. *U. States v. La Jeune Eugenie*, 2 Mason's Rep. 409.—AM. Ed.

C. III. s. 1. a child may be a witness ; for then *all* are supposed to have attained a competent knowledge of right and wrong ; but short of that age, the receipt or rejection of his testimony must, in every case, depend upon the sense of religion, and apparent understanding of the child, when examined previous to the oath being administered to him*(c) A person, deaf and dumb, if of sense to have intelligence conveyed to him, may be a witness, and give his evidence by signs, through the medium of an interpreter.(d)

Ratton's Cas.
Leach. Cro.
Cas 455.

* In the case of the *King v. Travers*, 2 *Str.* 70, the prisoner was indicted for a rape on a child of six years old, and Lord C. B. GILBERT refused to admit the child as a witness, wherefore the prisoner was acquitted. He was then indicted for an assault, with an intent to ravish, and the indictment coming on to be tried before RAYMOND C. J. at the next assizes but one, the same objection was taken by COMYNS and DARNELL, Serjeants, that the girl being then but seven years of age, could not be a witness. The counsel for the prosecution endeavoured to distinguish the case of a misdemeanour from that of a capital offence ; but RAYMOND C. J. held, that there was no difference between offences capital and lesser offences, in this respect, and that a person who could not be a witness in one case, could not in the other. He said, that the reason why the law prohibited the evidence of a child so young was, because the child could not be presumed to distinguish between right and wrong : no person had ever been admitted under the age of nine years, and very seldom under ten. He then mentioned two cases at the Old Bailey, and rejecting the evidence of the child, the defendant was acquitted.

But in *Brazier's* case, 18th April, 1779, (*Bul. N. P.* 393. *Leach. Cro. Cas.* 237,) the question was again considered by all the Judges, and they held, that a child of any age might be examined on an indictment for an assault on her with intent to ravish, if she appeared to be acquainted with the nature and obligation of an oath.

See the several cases collected in 1 *East's Cro. Law*, 441.

(c) If a witness is of the age of fourteen years, the Court are not obliged to interrogate her as to her knowledge of the nature and obligation of an oath, unless some fact should be proved *aliunde*, which would incapacitate her as a witness. *Den v. Vaneleve*, 2 *South. Rep.* 589.

A person above fourteen years, is presumed to be *deli capax*. *State v. Doherty*, 2 *Owerton's Rep.* 80.—AM. ED.

(d) A person deaf and dumb from his nativity, having sufficient capacity, may execute a deed. *Brown v. Brown*, 3 *Con. Rep.* 299.

So one deaf and dumb may be convicted of larceny. *Commonwealth v. Hill*, 14 *Mass. Rep.* 207.—AM. ED.

SECTION II.

Of persons incompetent, by reason of the infamy of their character.

IN the next place, the moral character of a witness is to be considered. When stigmatised by a conviction of certain crimes, his evidence is wholly inadmissible, and he becomes what the law calls an *incompetent* witness;* but other crimes, though much detracting from the character and *credibility* of a man, do not render him so totally infamous as to prevent him from being heard in a Court of Justice: nevertheless, the parol testimony of witnesses upon oath, as to his general character, is received as evidence, to be left to a jury, whether such a man is a person on whose testimony reliance can be placed. The *viva voce* evidence to destroy the credit of a witness, must be that of persons who have known his *general character*, and who take upon themselves to swear from such knowledge, that they would not believe him upon his oath. This general evidence is all they are allowed to give *against* him, for no man can be supposed prepared to give a history of all the transactions of his life, in answer to a charge suddenly made upon him in a Court of Justice; but the party, whose interest it is to support his character, may call upon the witness against him to declare the grounds on which their opinion of him is founded.^(e) Though only *general evidence* can be given as to his *general character*, yet de-

Ch. III. s. 2.
Competent
and Credible.

4 St. Tr. 692.
Rex v. Taylor, Peak. N. P. 11.
Bul. N. P. 296.

* No two words have been more frequently confounded together, and consequently less understood, than those of *competent* and *credible*. A witness is properly said to be *competent*, whenever he can be at all examined before a Court of Justice, and this *competency* is a question of law to be determined by the Judge, previous to his giving evidence in the cause. If the law permits him to be examined, his *credibility* forms the most important part of the consideration of a jury, and they must decide on this according to the opposing or corroborating circumstances of the case. The expression of "*credible witness*" is often used in Acts of Parliament, but this means nothing more than that the magistrates shall judge as the jury would do of his *credibility*, but leaves the question of his *competency* as before. 1 Burr. 417.

(e) Where a witness said he would swear to any thing for six pence, this declaration will go only to his credit. *Newhal v. Wadhams*, 1 Root's Rep. 504.

The credit of a witness may be impeached, by shewing that at the time the facts sworn to took place he was intoxicated, but the intoxication must be proved by direct evidence, or by the acts and conduct of the witness. *Tuttle v. Russell*, 2 Day's Rep. 201.

In the case of *The State v. Stallings et al.* 2 Hayw. Rep. 300, after argument, the

Ch. III. s. 2.
General
Character.

Wright dem.
Clymer v.
Littler, 3
Burr. 1244.
Harwdell v.
Jarman,
Taunton Sp.
As. 1789.
Hastings' case,
D. P. 11 June,
1789, per
Lord C. Thur-
low, Vide
ul. N. P.
37.

Ibid.
See also Al-
exander v.
Gibson, 2
Campb. 555.

clarations made by him on the same subject, contrary to what he swears at the trial, whether on his original or cross examination, may be given in evidence to impeach his credit; and even after the death of the subscribing witness, a confession made by him on his death-bed, that the will which he attested was a forgery, may be given in evidence to rebut the presumption arising from proof of his hand writing. (f)

It should here be understood, that it is the party *against* whom a witness is called only, that is permitted to attack his character by *general evidence*; for if the same privilege were allowed to the party calling him, the consequence would be, that such party might destroy the credit of a witness if he spoke against his wishes, and make him a good witness if his evidence was favourable, at the same time that he had the means of destroying his credit in his hands. But if a witness prove *facts* in a cause which make against the party who calls him, that party, as well as the other, may call other witnesses to contradict him as to those facts; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first, but the impeachment of his credit is incidental, and consequential only. (g)

Court decided that you are not confined to the question whether a witness be a man of veracity, or of veracity when upon oath, but that you may inquire whether he be a man of *bad moral character*.

Evidence of general character for truth, derived from the *common report* of the neighbourhood, is admissible. *Kimmel v. Kimmel*, 3 *Serg. & R. Rep.* 336.

Testimony to impeach the credit of a witness, by shewing that she either was, or had been a common prostitute, is inadmissible. *Jackson ex. d. Boyd v. Lewis*, 13 *Johns. Rep.* 504.

A contrary decision was made in *Massachusetts. Commonwealth v. Murphy*, 14 *Mass. Rep.* 387.

General character may be given in evidence in behalf of one on trial for a capital offence. *Commonwealth v. Hardy*, 2 *Mass. Rep.* 317.—AM. ED.

(f) Where the credit of a witness is impeached, the record of the Supreme Court of a suit between other parties, is evidence as introductory, to prove that a witness who was examined on the trial of that suit, gave the same evidence he had given in this. *Poster v. Shaw*, 7 *Serg. & R. Rep.* 156.

Evidence may be given of the declarations of a witness to contradict what he stated in his examination, or to shew that he did not tell the *whole truth*. *Stahle v. Spohn*, 8 *Do.* 317. *Tucker v. Welch*, 17 *Mass. Rep.* 160. *The State v. Alexander et al.* 2 *Rep. Const. Ct. S. Car.* 171.

Where witnesses are called to prove declarations made by a witness, inconsistent with what he deposes on the trial, it is perfectly regular in reply to shew other declarations made by the same witness in affirmance of what he has then sworn, and that he is still consistent with himself. *Johnson v. Patterson*, 2 *Hawks' Rep.* 183.—AM. ED.

(g) Every person, by the principles of the common law, *not interested, and not*

But to return to those offences, a conviction of which totally excludes the testimony of a witness, and renders him incompetent.

Ch. III. s. 2.
Conviction of
Crimes.

Treason or felony, and every species of what is called in our books the *crimen falsi*, such as perjury, conspiracy to accuse another of a crime, barratry, attain of false verdict, bribing a witness to absent himself from giving evidence, &c. prevent a man, when convicted of them, from being examined in a Court of Justice. (h) According to the ancient notion, every offence

Pendock dem.
Mackinder v.
Mackinder,
2 Wils. 218.

of infamous character, may be a competent witness. Per TILGHMAN C. J. in *Baring v. Shippen*, 2 Binn. Rep. 165.

The party who introduces a witness cannot afterwards invalidate his testimony on the ground of interest. *Denn ex. d. Farrar v. Hamilton*, *Tayl. Rep.* 14.

A party cannot impeach the credibility of his own witnesses. *Sawrey v. Murrell et al.* 2 Hayw. Rep. 397.

If a witness testify against the party by whom he is called, it is competent for that party to prove that the witness was mistaken in any part of his evidence, by calling other witnesses to rectify the mistake, or to prove that on other occasions he had related the story in a different manner. *De Lisle v. Priestman*, 1 Browne's Rep. 176. (Affirmed in the Supreme Court on error. *ibid.* n.)

Et vide in *New York, Steinbach v. Col. Ins. Co.* 2 Cuines. Rep. 120.

In *Massachusetts*, vide *Webster v. Lee*, 5 Mass. Rep. 334.

In *North Carolina*, in the case of *The State v. Norris*, 1 Hayw. Rep. 429, it was decided that the Attorney General might discredit his own witness.

But in civil cases neither party can do so. *ibid.* *S. P. Sawrey v. Murrell et al.* 2 De. 397. Et vide *Denn ex. d. Farrar v. Hamilton*, *Tayl. Rep.* 11.

Where a party calls a witness, who is contradicted by another witness of his own, he cannot call his first witness to disprove what the second has said. *Rapp v. Le Blanc et al.* 1 Dall. Rep. 63.

If a witness, in a deposition on cross interrogatories, state as facts, circumstances not pertinent to the cause, what he has said or sworn in another cause, where those circumstances were pertinent, cannot be read to discredit him; *aliter* if he has, on a former occasion, said or sworn differently from what he now deposes, in a matter relative to the cause in which his deposition is read. *Lamatre v. Caze*, C. C. April, 1808, *M. S. Rep.*

The plaintiff cannot put a question to a witness called by him to rebut the defendant's testimony, which is not intended to contradict or discredit the defendant's witnesses, and which question is not rendered necessary by any evidence given by the defendant. *Evans v. Eaton*, 1 Peters' Rep. 338.—AM. ED.

(h) A conviction upon an indictment for an assault and battery, with intent to kill, in consequence of which the person indicted was sentenced to imprisonment, does not make him an incompetent witness. *U. States v. Brackens*, C. C. Oct. 1811, *M. S. Rep.*

A pardoned convict was offered as a witness for the people, on the trial of an indictment, and the pardon contained a proviso that nothing therein shall be construed so as to relieve the said person of and from the legal disabilities to him from the conviction, sentence, and imprisonment, other than the said imprisonment; it was held that the proviso being inougruous and repugnant to the pardon, ought to be rejected, and the witness was competent. *The People v. Pease*, 3 Johns. Cas. 333, Et vide *In the matter of Denning*, 40 Johns. Rep. 232.

- Ch. III. s. 2. which subjected a man to the pillory, and for which he was sentenced to stand there, whether followed with that punishment or not, was considered as rendering him infamous; 1) but the modern practice has with more propriety been to consider the *offence* and not the *punishment*, as that to which infamy is attached; and it is now held, that unless a man is sentenced to the pillory for a crime partaking of fraud, the mere circumstance of an infamous punishment being inflicted, does not destroy his competency; (2) and, therefore, a man being convicted of a treasonable libel, or slanderous words on the government, and for that sentenced to the pillory, (3) is not thereby rendered incompetent; and on the other hand, if he be convicted of barratry, or other infamous offence, though he is only sentenced to be fined, such conviction renders him incompetent. (4)
- (1) Vide Com. Dig. Test. moigne, (A.) 2. Co. Litt. 6, b.
- (2) *Rex v. Pridle*, Leach Cro. Cas. 496. Clancy's case, Fortescue, 208. Vide Salk. 689, 690.
- (3) *Chater v. Hawkins*, 3 Lev. 426.
- (4) *Rex v. Ford*, Salk. 690. Vide etiam Pendock dem. Mackinder v. Mackinder, 2 Wils. 18; Willes, 667.
- (5) *Rex v. Crosby*, Salk. 289.
- (6) Vide 1 Vent. 349. 4 St. Tr. 682.
- (7) *Gully's case*, Leach. Cr. Cas. 115.
- When a man is convicted of any of the offences before mentioned, and judgment entered up, he is for ever afterwards incompetent to give evidence, unless the stigma is removed, which in case of a conviction of perjury, on the Statute of 5 Eliz. c. 9, can never be by any means short of a reversal of the judgment, for the Statute has in this case made his incompetency a part of the punishment; (5) but if a man be convicted of felony or perjury, or any other offence at common law, and the King pardon him by name, or grant a general pardon to all such convicts, this restores him to his credit, (6) and the judgment no longer forms an objection to his testimony. In these cases, however an actual pardon must be shewn under the great seal, the warrant for it under the King's sign manual not being sufficient. (7) Peers of Parliament and clergymen, who are entitled to benefit

In *Massachusetts*, nothing short of a conviction on an indictment for *crimen falsi*, and a judgment on it, is a sufficient objection to the competency of a witness. *Cushman v. Loker*, 2 Mass. Rep. 108. *Commonwealth v. Snell*, 3 Do. 82. *Churchill v. Suter*, 4 Do. 162.

It has likewise been held that the conviction of an infamous crime in a foreign country, or in any other of the *U. States*, does not render the subject of such conviction an incompetent witness there. *Commonwealth v. Green*, 17 Do. 515.

Quere, Whether in *Maryland* a mulatto born of a manumitted negro mother, is a competent witness, against a free born white christian, in a prosecution for felony. *The State v. Fisher*, 1 Har. & Johns. Rep. 750.

A convict transported is not disqualified from being a witness, unless it be proved he was transported for some offence made *felony* or *infamous* by the common law, or by some Statute. *Clarke's les. v. Hall*, 2 Har. & M'Hen. Rep. 378.

So, one transported from *Great Britain*, cannot be restored to his credit, without actual service, during the seven years. *State v. Ridgeley*, *ibid.* 120.

But the party objecting must prove that he did not serve out the seven years, *Cole's les. v. Cole*, 1 Har. & Johns. Rep. 572.—A. E. D.

of clergy unconditionally,(1) and where no judgment is given, are not incapacitated by the conviction of a clergyable offence. But, in other cases, the convict is incompetent till restored by one of the means pointed out by the Statutes, in lieu of the old mode of purgation. If he be burnt in the hand and discharged, his credit is thereby restored, and he becomes a competent witness, because the burning in the hand amounts to a Statute pardon,(2) which, whether particular or general, always restores competency; and in this case, if the record be produced whereby clergy was granted, it is sufficient, without proving that he was actually burnt.(3) By Stats. 4 *Geo.* 1, c. 11; and 19 *Geo.* 3, c. 74, if a person convicted of a clergyable offence be transported, fined, or whipped, instead of being burnt, his competency is also restored; but when judgment of death is given, and the convict receives a conditional pardon on being transported for life, he is not thereby rendered competent;* and by Stat. 31 *Geo.* 3, c. 35, it is enacted, that no person shall be an incompetent witness by reason of a conviction of petty larceny. Still, though competent, the conviction in all these cases would much affect his credit with a jury.

To found this objection to the testimony of a witness, the party who intends to make it should be prepared with a copy of the judgment regularly entered upon the verdict of conviction; for until such judgment is entered, the witness is not deprived of his legal privileges.(4)(i) This proof was formerly as now the only mode by which the objection could be raised, for it was then considered as a rule, that no man could be examined to prove his own infamy:(5) But according to a modern decision on this subject, though a man cannot be asked any question tending to convict him of a crime,(6) and thereby be put in danger from his own examination, yet he may be asked whether he has been already convicted, and has suffered the judgment of the law; for his answer to these questions can put him in no

Ch. III. s. 2.
Convicted of
Crimes.

(1) Stat. 1 Ed.
6, c. 12, s. 4.

(2) *Rex v.*
Lord Castle-
main, Sir T.
Raym. 380;
Kel. 37.

(3) *Per Tre-*
vor, 7 Ann.
Corn. Dig.
Testimoniae,
(A.) 4.

(4) *Wicks v.*
Smallbrooke,
1 Sed. 51.
Lee v. Gan-
sel, Cowp. 3.
See also *Rex*
v. Teal, cited
post.

(5) *Vide*
Wood's Inst.
594. Bul. N.
P. 292.

(6) *Rex v.*
Edwards, 4 T.
Rep. 440.

* *Vide Bullock v. Dodds*, 2 *Barn. & Ald.* 258, in which it was holden that a capital convict, who was pardoned on condition of transportation for life, was not restored to his legal abilities by having gone to *Botany Bay* and returned from thence by the license of the Governor, though such Governor had power by his commission to remit any part of the sentence.

(i) Objections to the competency of a witness, founded on a conviction of crime, must be made at the trial, and when the witness is offered to be sworn, and must be supported by the record of the conviction and judgment. *Commonwealth v. Green*, 17 *Mass. Rep.* 515.

But in *The State v. Ridgley*, 2 *Har. & McHen. Rep.* 120, the Court determined that parol evidence was admissible, to prove a man a convict.—*Am. En.*

Ch. III. s. 2.
Convicted of
Crimes.

Rex v. Inha-
bitants of Cas-
tel Caradimon
8 East, 77.

Disgraced by
their own ex-
amination.

further peril; and therefore when a man came to justify himself as bail, the counsel opposing him was permitted to ask him, whether he had not stood in the pillory for perjury; and, on his admitting the fact, he was of course rejected; but in a very late case the old rule was adhered to, and it was held that a man could not be rendered incompetent by his own acknowledgment that he had been convicted of felony, but that a copy of the judgment should be produced.(k)

The practice of asking a witness either on the *voir dire*, or on cross-examination, any question, except such as might tend to make him accuse himself of a crime of which he had not been convicted, and therefore expose himself to prosecution, had so long continued without objection, that no one at the bar thought of questioning the legality of it.(l) But some of the Judges, struck perhaps with the injury which in some few instances, have been done to the feelings of an honourable and virtuous mind, and relying on the *dicta* of some of their predecessors, have lately thought that neither convenience nor authority justifies this mode of examination; and have therefore laid it down as a rule, that a witness shall not be rendered *infamous*, or even *disgraced* by his own examination, as to facts not connected with the cause in which he is examined. The highest and most enlightened characters in the profession were, at one time, much divided on this point; and even in the decisions which have taken place since the first publication of this work, different Judges appear to have proceeded on different principles, and to have rejected or permitted the examination to different extents.(m)

(k) Where the son combined with the father to protect the property of the latter from his creditors, by receiving a deed from him, it was ruled that the son was privileged from giving evidence of the fact, in an action, brought to invalidate a deed given to another brother under similar circumstances. *Galbraith et al. v. Eichelberger*, 3 Yeates' Rep. 515.

A Court of Chancery will not compel the discovery of that, which if disclosed would charge the party with a crime. *Busler v. Catling*, 1 Root's Rep. 310.

A Judge is not bound to answer questions which may impeach his conduct as a public officer. *Jackson ex. d. Wyckoff v. Humphrey*, 1 Johns. Rep. 498.

In the case of *The State v. Bailey*, 1 Penn. Rep. 415, the Court would not permit the witness to be asked if he had not been convicted of petit larceny and punished.—AM. ED.

(l) The witness, and not the Court, has the right to Judge of the tendency of a question put to him, whether it will criminate him or not. *State v. Edwards*, 2 Nott & McCord's Rep. 13.—AM. ED.

(m) The maxim *nemo allegans turpitudinem suam audiendus est*, does not apply to witnesses. *Brown v. Downing*, 4 Serg. & R. Rep. 494.

The first case which came before the Court after the original publication of this book) and while the subject continued to excite some interest in *Westminster Hall*, was that of the *King v. The Inhabitants of Castel Careinion*, before cited, wherein the Court decided that the record of conviction must be produced to reject the testimony of a witness; and after several decisions at *Nisi Prius*, wherein nothing was decided, arose the case of *Spenchley qui tam v. De Willot*. That was an action for usury; the defendant's counsel wished to cross-examine the plaintiff's witness, *as to contracts made with several other persons*, from whom he had taken up money; for the purpose either of raising an inference that the transaction with the defendant was of the same description, or, in case the witness misrepresented those transactions, of entitling themselves to call the persons with whom they took place to contradict him. Lord ELLENBOROUGH, at *Nisi Prius* refused to permit these questions to be put to the witness: and a motion being made for a new trial, the Court were all decidedly of opinion, that it was not competent to counsel on cross examination to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he answered in the negative. They observed, that the rule had been laid down again and again, that, upon cross-examination to try the credit of a witness, only general questions could be put; and he could not be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness. The danger of such a practice they said would be obvious, besides the inconvenience of trying as many collateral issues as one of the parties chose to introduce. Lord ELLENBOROUGH added, that he had ruled this point again and again at the sittings, till he was quite tired of the agitation of the question; and therefore he wished a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might be finally put at rest.

Ch. III. s. 2.
Discrediting
them.

Vide ante,
202.

Spenchley v.
De Willot,
7 East, 108.

In these cases we may observe, that the Court would not permit any examination into matters not immediately connected with the cause, for the purpose of impeaching the character and

It does not apply to witnesses to instruments not negotiable. *Doe ex. d. Gwyn et al. v. Stokes et al.* 2 Hawks' Rep. 235.

The Court will always instruct the witness to enable him to determine whether he may be jeopardized by his answer; and if the answer forms only one link, in the chain of testimony against him, he is not bound to answer. *State v. Edwards*, 2 Nott & McCord's Rep. 13.—AM. ED.

Ch. III. s. 2.
Discrediting
them.

(1) *Harris v.*
Tippet, 2
Campb. 637.
Append.

(2) *Yewen's*
case, *Ibid*,
633.

credibility of the witness. In others, which came before Mr. Justice LAWRENCE, he permitted questions to be asked the witness, as to his conduct in attempting to dissuade other witnesses from attending to give evidence in the cause, (1) or as to his having been himself charged with felony, by the person against whom he appeared as a witness ; (2) but ruled, that his answer must be taken as to the fact, and that no other witness could be called to contradict him ; thereby, in some respects, breaking in upon the rule, that he could not be disgraced by his own examination. In the course of the proceedings on the bill of pains and penalties against the Queen, the House of Lords and the Judges seem to have gone still further ; for when an attempt was made to discredit a witness of the name of *Sacchi*, by shewing that he had attempted to suborn other witnesses against the Queen, no question was made whether witnesses could be called to prove that fact, but only, whether it was competent so to impeach his credit, without first cross-examining him as to its existence. While the point was new, I offered to the profession, as part of the text, such arguments as appeared to me applicable to both sides of it ; but as it may now be considered as settled, that matters wholly foreign to the cause cannot be inquired into from the witness himself, those arguments are now reprinted in the Appendix.

Accomplices
or joint tres-
passers.

Vide *Gilb.*
Ev. 139. *Cases*
Temp. Hard.
163. *Bel. N.*
P. 286, and
cases there
cited.
Dr. Dodd's
Cas. Lench.
Cro. Cas. 184.

See *Rudd's*
case, *post*.

Rex v. Teal,
11 *East*, 307.

Rands v.
Thomas,
5 *M. & S.*
244.

One who is *particeps criminis* is a competent witness for the plaintiff or prosecutor, in every case, though left out of the declaration or indictment, for the purpose of being called as a witness ; and if he has been made a defendant, he may at any time be made a witness, by entering a *nolle prosequi* as to him. In trespasses, where a satisfaction by one is a discharge of the others, it may go to his credit ; and much more in criminal cases, where a promise of pardon has been given him, but no actual pardon granted. Indeed it has been thought by some, that in a criminal case, a witness who has had a promise of pardon is thereby rendered incompetent on account of the strong bias which the promise must give to his mind, but this is now considered as affecting his credit only : and even where a woman admitted, on her examination, that she had sworn falsely against a person whom she charged with being the father of a bastard child ; she was still considered as competent to prove, on an indictment for a conspiracy, against third persons that they had suborned her to commit the perjury. And in like manner, in an action against a defendant as part owner of a ship : a person who had made an affidavit that the defendant was such part owner, in order to have his name entered as such in the register,

was held to be competent to prove that he had inserted his name without his consent, and that in fact the defendant had no interest.

Ch. III. s. 2.
Religion.

Under this head, of the moral character of witnesses, may be classed the notice which the law takes of their religious principles or prejudices. At the time when a gloomy superstition had obscured all liberal sentiment, we are not to suppose that our own laws, more than those of surrounding nations,* were favourable to men whom the austerity of its professors stigmatised as *infidels*. Those to whom the divine doctrines of the Gospel were unknown, were deemed incapable of binding themselves by the solemn obligations of an oath, the zeal of our ancestors not permitting them to believe that the profane rites of another religion could be obligatory on the consciences of its votaries, or be legally acknowledged in a Christian Court of Justice. *Jews* were received in the Common Law Courts, because they could swear on the Old Testament, which is part of our belief; but the civil law went so far as to exclude even them, and all *heretics*, from examination. I am not aware that it has ever been expressly determined that *excommunicated persons* cannot be received as witnesses, though *dicta* are to be found which go to establish the position; had the question arisen even before the late Statute, a contrary decision would probably have taken place, for in modern times much more liberality has been shewn in this particular. But now, by Statute 53 *Geo. 3, c. 127, s. 3*, it is enacted, that no person who shall be declared or denounced excommunicate shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the Court pronouncing such person excommunicate shall direct. Sir MATTHEW HALE, to whom the want of care or zeal in protecting the religion of his country can never be imputed, seems to have been of opinion that *infidels* might, in some cases, be examined, for he puts them all on the same footing as *Jews*, and observes, that, "it were a very hard case, if a murder committed here in Eng-

Co. Litt. 6.
Hawk. P. C.
434.

Vide Gilb.
Law Ev. 145.
2 Hal. P. C.
279.

Gilb. Law Ev.
146.

2 Hal. P. C.
729.

* It has been observed by Sir MATTHEW HALE, that the *Spaniards* had special laws touching the form of oaths to *infidels*: and Lord MANSFIELD, then Solicitor General, in his argument in the great case of *Omichund v. Barker*, also mentioned, that in *Spain*, *Moors* were, in very early times, permitted to swear on the Koran, and cites the form of their oath from *Selden*. We are not to ascribe this deviation from the practice at that time common in Christian countries, to any extraordinary liberality in the minds of the *Spaniards*, but to the divided empire which the *Moors* held with them, and which would necessarily be the cause of much indulgence to the latter.

Ch. III. s. 2.
Religion.

Omichund v. Barker, 1 Ark. 21; 1 Wils. 84, S. C. Willes, 538, S. C.

Rex v. Taylor, Peak. N. P. 11.

Rex v. White, Leach's Cro. Cas. 482.

Form of swearing.

land, in presence only of a *Turk* or a *Jew*, that owns not the Christian religion, should be punishable, because such an oath should not be taken which the witness held binding, and cannot swear otherwise; and possibly might think himself under no obligation if sworn according to the usual style of the Courts of *England*. But then, (he adds) it is agreed that the credit of such a testimony must be left to the jury.* Notwithstanding this, the general received opinion was, that they could not be witnesses, till the case of *Omichund v. Barker* came before Lord HARDWICKE, when it was solemnly decided by him, assisted by the two Chief Justices (LEE and WILLES,) and the Chief Baron PARKER, that the evidence of a *Gentoo*, sworn according to the ceremonies of his own religion, was admissible: and the general principle established, that the testimony of all infidels, who are not atheists, was to be received.† In a late case before Mr. Justice BULLER, he would not suffer the particular opinions of a man, professing the Christian religion, to be examined into; but made the only question, whether he believed the sanction of an oath, the being of a Deity, and a future state of rewards and punishments? But a person who has no idea of the being of a God, or a future state, is not admitted.(n)

The usual form of administering the oath to Christians is, by the witness laying his hand on the *New Testament*, while the oath is repeated to him, and kissing the book at the conclusion;

* How different is this mild and humane language, from the intemperate zeal of Sir EDWARD COKE, who says, "that all *infidels* are in law perpetual enemies; for between them, as with the devils whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace." Vide *Cohin's Case*, 7 Co. 17, a.

† So in *Fachina v. Sabine*, 2 Str. 1104, it was held at the council, in the presence of the two Chief Justices, that a *Mahomedan* might be sworn on the Koran. See also *Morgan's Case*, Leach's Cro. Cas. 64. By the report of Lord C. J. WILLES' judgment, from his own manuscript lately published, it should seem that he confined his opinion, as to the admissibility of *Gentoo*s, to the particular case of a contract made in a foreign country, but the subsequent decisions have left no doubt that they are admissible in all cases. At the O. B. Sess. Dec. 1804, *Eypune*, a native of *China*, being examined as a witness (before Mr. B. GRAHAM) on an indictment against *Ann Alsley* and *Thomas Gunn*, for felony, was sworn according to the form of the Courts of *China*, viz. by holding a saucer in his hand, which he dashed to pieces at the conclusion of the oath, believing, as he stated, that God would cause his body to be cracked, as he cracked that saucer, if he did not tell the truth. Sess. Pap. 1804 and 1806, p. 62.

(n) A witness not allowed to give testimony, unless he have discretion, and believes in a future state of rewards and punishments. *State v. Doherty*, 2 Overton's Rep. 80. *Jackson ex. d. Tuttle v. Gridley*, 18 Johns. Rep. 98. *Curtis v. Strong*, 4 Day's Rep. 51.

But in *Hunscom v. Hunscom*, 15 Mass. Rep. 184, it was decided that a disbeliever of a future state of existence, went only to the credibility of the witness.—AM. ED.

and the like ceremony is observed with respect to the Jews when they swear on the *Old Testament*: but this form has frequently been dispensed with. In one case, Doctor *Owen*, Vice Chancellor of *Oxford*, being called as a witness, refused to be sworn by laying his right hand on the book and kissing it, but caused the book to be held open before him, and lifted up his right hand; the jury in this case prayed the opinion of the Court, if they ought to think this testimony as strong as that of a witness otherwise sworn; and *GLANVILLE*, Chief Justice, told them, that in his opinion, he had taken as strong an oath as any other witness; but said, that if he were sworn himself, he would kiss the book. In like manner, a *Scotch covenantor* has been permitted to swear by holding up his hand;(1) and a man who was educated a Jew, but at the time of giving his evidence professed Christianity, though he had never been baptised, nor formally renounced Judaism, was also permitted by Lord KENYON to swear on the New Testament;(2) for as Lord Chief Baron PARKER observed, in *Omichund v. Barker*,(3) "Oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences." In the proceedings before the House of Lords, on the bill of pains and penalties against the Queen, (*August 24th, 1820*), certain *Italian* witnesses were examined, and they having been sworn in the ordinary form, the counsel for the Queen, on the authority of this expression, were proceeding to inquire of the witness, "whether there were any forms wanting in the oath, which would be used in his own country, and which he deemed necessary to the binding his conscience?" and an objection being made to this course of examination, a question was propounded to the Judges, who answered, "That although the witness should have taken the oath in the usual form, without making any objection, he might nevertheless be afterwards asked, whether he considered the oath he had taken as binding on his conscience? and that if he answered in the affirmative, he should not be questioned whether he considered any other mode of taking an oath more binding."(4) This certainly is the best test of truth; and the

Ch. III. s. 2.
Religion.

Dutton v.
Colt, 2 Sid. 6.

(1) *Mild-
roue's case*,
Leach's Cro.
Cas. 459.
Mee v. Reed,
Peak. N. P.
23.

(2) *Rex v.*
Gilham, 1
Esp. Cas. 285.

(3) 1 Atk. 42.
See also
Cowp. 389.

(4) The opinions of a witness relative to the obligations of an oath, may be proved by his declarations out of Court. *Curtis v. Strong*, 4 *Day's Rep.* 51.

And in such case the witness cannot be admitted to deny or explain, in Court, the declarations imputed to him, as it would be absurd to admit a man to his oath for the purpose of learning from him whether he had the necessary qualifications to be sworn. *ibid.*

Evidence of conversations and declarations held by one offered as a witness, was given to prove him an *infidel*, who disbelieved in revealed religion, and the being of a God. *Bow v. Parsons*, 1 *Root's Rep.* 480.

The defendant offered to prove that the plaintiff, who was sworn as a witness,

Ch. III. s. 2. Legislature, on this ground, have, by several Acts of Parliament, Religion. (viz. 7 & 8 Will. 3, c. 34; 1 Geo. 1, st. 2, c. 6; 8 Geo. 1, c. 6, and 22 Geo. 2, c. 30, s. 46,) dispensed with any oaths at all from

(1) *Rex v. Gardner*, 2 Burr. 117.

(2) *Castle v. Bambridge*, 2 Stra. 854.

(3) *Rex v. Wych*, 2 Stra. 872.

(4) *Rex v. Bell, And.* 200.

(5) *Oliver v. Lawrence*, 2 Stra. 946.

(6) *Rex v. Turner*, 3 Stra. 1219.

(7) *Atcheson v. Everett*, Cowp. 382.

Quakers in civil cases; but their affirmation is still inadmissible in criminal proceedings, to charge or exculpate another, though it may be read to exculpate themselves. (1) It has been held, that an appeal of death, (2) and motions for informations (3) and attachments, (4) or to answer the matters of an affidavit, (5) are criminal proceedings within these Statutes; and that consequently, in such cases, their affirmation is inadmissible; but that a motion to quash an appointment of overseers, (6) or a *qui tam* action, (7) are not criminal proceedings, and that in those cases the affirmation of a Quaker may be received (p)*

to be an atheist who denied the existence of a God, the doctrines of the Trinity, and the truth of divine revelation; and the Court allowed proof as to the denial of the being of a God. *Beardsley v. Foot*, 2 Root's Rep. 399.—AM. ED.

(p) One who was not a Quaker, refusing to be sworn, on the ground of conscientious scruples arising from a declaration formerly made, was committed for contempt, the liberty to affirm being strictly confined to Quakers by the laws and practice of *Massachusetts*. *U. States v. Coolidge*, 2 Gallis. Rep. 364.

But Legislative provisions have been made in most of the States, making the affirmation of a person conscientiously scrupulous of taking an oath of the same effect, as an oath.

A Jew who refused to be sworn as a witness in a cause tried on a *Saturday*, because it was his *Sabbath*, was fined by the Court 10*l*. *Stansbury v. Marks*, 2 Dall. Rep. 213.

In the case of *The Commonwealth v. Allen, Oyer and Terminer at Philadelphia*, tried on the 20th November, 1821, on an indictment for murder, before TILGHMAN C. J. and GIBSON J. upon impanelling the petit jury, a juror was called, and not being challenged by the prisoner, was ordered to be sworn. The juror prayed to be excused, stating to the Court, that his conscience would not allow him to pronounce a verdict against any man for a crime, *punished with death*. The counsel for the Commonwealth stated, that the Commonwealth had no right to peremptory challenges in cases of felony; that the right of peremptory challenge was taken from them in such cases, by Act 29th March, 1813, 6 Sm. L. 68, otherwise the juror should be relieved by challenge. The prisoner's counsel refusing to excuse the juror, the counsel for the Commonwealth, after putting a few questions as to the juror's conscientious scruples, challenged him for cause: this was opposed by the defendant's counsel and over-ruled by the Court, and the juror ordered to be affirmed: he refused to take the affirmation, upon which the Court ordered him to be imprisoned for twenty-four hours.

In *Sellick's Case*, 1 *New York City Hall Recorder*, 185, a juror, not belonging to the society of Friends, under circumstances similar to *Allen's Case*, (the Stat. of 33 Ed. 1, not being altered,) was challenged by the counsel for the prosecution, and the Court ordered the two first persons sworn on the panel, to be sworn as triors, and upon an investigation of the case, they found a verdict in favour of the challenge, the juror therefore was set aside.—AM. ED.

* In this case of *Atcheson v. Everett*, Cowp. 382, Lord MANSFIELD gave a very elaborate judgment on the Statutes made for the relief of Quakers, and on the nature of oaths in general; the extensive learning of which, is only equalled by the mild spirit of toleration inculcated by it.

SECTION III.

Of persons incompetent by reason of their interest in the cause.

THE rule which has the most extensive operation in the exclusion of witnesses, and which has been found most difficult in its application, is that which prevents persons interested in the event of a suit, (unless in a few excepted cases of evident necessity,) from being witnesses in it.—What is such an interest as shall totally exclude testimony, has often been the subject of controversy.(q) The old cases have gone upon very subtle

Ch. III. s. 3.
General Rule.

Per Lord
Mansfield,
1 T. Rep.
300.

(q) To exclude a witness on the ground of interest, he must have a *certain*, not a *possible*, benefit in the event of the suit. *Lewis v. Manly*, 2 Yeates' Rep. 200. *Fernalter v. Carlin*, 3 Serg. & R. Rep. 150. *Peyton v. Hallett*, 1 Caines' Rep. 363. *Gage v. Stewart*, 4 Johns. Rep. 293. *Stockham v. Jones et al.* 10 Johns. Rep. 21.

It is immaterial how small that interest is. *Butler v. Warren*, 11 Johns. Rep. 57. *Beach v. Smith*, 2 Con. Rep. 269. *Barnwell et al. v. Mitchell*, 3 Do. 101.

In *Smith et al. v. Carrington et al.* 4 Cranch's Rep. 62, it was held that if a suit be brought for distinct matters of account or causes of action, the witness may testify as to those in which he is not interested. Vide *Bent v. Baker*, 3 Term Rep. 35. BUTLER J. says, that if a witness is competent to answer any questions, he ought not to be rejected generally. Et vide *Stallon v. Tomlinson*, 2 Root's Rep. 132.

But in *Gage v. Stewart*, 4 Johns. Rep. 293, it was decided that a witness interested in one part of the demand, cannot be admitted as to another part.

The interest which a person has in the verdict, or event of the suit, is the criterion by which his competency is to be tested. If he is interested in the *question*, but not the *verdict*, it goes to his credit, but not to his competency. *Wakeley v. Hart et al.* 6 Binn. Rep. 316. *Cornagg v. Abraham et al.* 1 Yeates' Rep. 84. *Farrel v. Perry*, 1 Hayw. Rep. 2. *Madox v. Hoskins*, *ibid.* 4. *Porter v. M'Chure*, *ibid.* 360. *Bliss et al. v. Thompson*, 4 Mass. Rep. 448. *Fairchild v. Beach*, 1 Day's Rep. 266. *Phelps v. Winchel*, *ibid.* 269, overruling the case of *Bacon v. Minor*, 1 Root's Rep. 258, and others in the same book.

A remote or contingent interest affects his credit only. *Stewart v. Kip*, 5 Johns. Rep. 256. *Falls et al. v. Belknap*, 1 Do. 486. *Baker et al. v. Arnold*, 1 Caines' Rep. 276. *Peterson v. Wilking et al.* 3 Dall. Rep. 506.

To render a person incompetent to give evidence, on the ground of interest, there must be a *direct* interest, that is, he must be immediately benefitted or injured by the event of the suit, or the *verdict* to be obtained by his evidence, or given against it, must be evidence for or against him in another action, in which he may afterwards be a party. *Hayes v. Grier*, 4 Binn. Rep. 80. *Van Nys v. Terhune*, 3 Johns. Cas. 82. *Case v. Rorvo et al.* 14 Johns. Rep. 79. *Day v. Green*, *Hardin's Rep.* 117. *Phelps v. Hall*, 2 Tyl. Rep. 399. *Harrison v. Harrison*, 2 Hayw. Rep. 355.

In an action against the Sheriff for a false return of *nulla bona*, where the goods had been rescued by a person claiming the property in them, the Court held, that

Ch. III. s. 3. grounds ; but, of late years, the Courts have endeavoured, as far General Rule as possible, consistent with authorities, to let the objection go

such person was a witness on the part of the Sheriff to prove that the goods were not the property of the debtor, for the Sheriff by his return was precluded from maintaining any action against the witness for such rescue ; he could not, therefore, use the verdict in any way against him, and as to a proceeding by any other person, the verdict would be *res inter alios acta*, and inadmissible : the witness could in no way be affected by the verdict. *Thomas v. Pearce*, 5 *Price's Ex. Rep.* 547.

If the plaintiff bring separate actions against joint trespassers, they may be witnesses for each other. *Johnson v. Bourn*, 1 *Wash. Rep.* 187.

Although the verdict may not affect, in another suit, the person offered as a witness, yet, wherever the verdict may create another responsibility, which the law would recognise and render available, in favour of, or against the witness, or increase or decrease an existing one, he ought to be rejected. Per GIBSON J. *Conrad et al. v. Keyser*, 5 *Serg. & R. Rep.* 370.

But where a person renders himself interested by a voluntary act, for the purpose of depriving a party of the benefit of his testimony, he may be compelled to be a witness. *Long v. Bailie*, 4 *Serg. & R. Rep.* 222.

The security in an administration bond, is not a competent witness for the administrator. *Bean's exr. v. Jenkins's adm.* 1 *Har. & Johns. Rep.* 135.

A witness who is liable to an action by the party by whom he is produced, in case that party should not recover, but who is protected by the Statute of Limitations, is competent. *Judlow v. Union Ins. Co.* 2 *Serg. & R. Rep.* 119.

Where two persons were jointly concerned in a contract of sale, their interest may be severed by a parol agreement on good consideration ; and one of them after the severance, is a competent witness for the other, in relation to a matter growing out of such contract ; he having parted with all his interest in the contract. *Smith v. Allen*, 18 *Johns. Rep.* 245.

The heir is not a competent witness in an action brought by an executor against an alleged debtor of the deceased. *White exr. v. Derby*, 1 *Mass. Rep.* 239. Et vide *West v. Randall et al.* 2 *Mason's Rep.* 181.

A. being in the service of *B.* and having engaged to pay his own board, applied to *C.* to board him, and agreed to take his pay out of goods from *B.*'s store, to which *B.* consented ; in an action by *C.* against *B.* for the board of *A.* he was offered as a witness, and these facts coming out on the examination of *A.* on his *voir dire*, he was rejected on account of his interest. *Emerton v. Andrews*, 4 *Mass. Rep.* 653. Sed vide the objections of SENECAR J. to this decision in *Marquand v. Webb et al.* 16 *Johns. Rep.* 89.

In an action for repairs done to a vessel, against one part owner, who neglects to plead the non-joinder of the others in abatement, another part owner is not a witness for the plaintiff, to prove the ownership of the defendant ; for, although he would be liable, as an owner, to the plaintiff in case he failed, or if he succeeded, would be answerable to the defendant for contribution, yet he has no interest, by charging the defendant (a verdict against whom would be evidence of his joint ownership) to increase the number of owners, and thus to diminish the amount of contribution or loss, which he would otherwise himself be obliged to sustain. *ibid.* Et vide *Tompkins v. Beers*, 2 *Root's Rep.* 498.

In trover for a chattel loaned by the plaintiff to his son, and eloiigned from him by a swindling contract, the son is not a witness for the plaintiff. *Pierce v. Hinds-dall*, 1 *Tyl. Rep.* 153.

In an action for a malicious prosecution, brought for charging the plaintiff and others with a riot of which they were acquitted, the other defendants in the indictment were rejected as witnesses. *Hall v. Dwight*, 1 *Root's Rep.* 76.

to the *credit* rather than to the *competency* of a witness; and the general rule now established is, that no objection can be made

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A *residuary legatee* cannot be a witness to increase the fund on which the *residuum* depends. *Austin v. Bradley*, 2 Bay's Rep. 466.

But where his interest is *very remote*, it will merely go to his credibility. *Galbraith's les. v. Scott*, 2 Dall. Rep. 95.

It seems a *specific legatee* cannot be. *Temple's exr. v. Ellett's exr.* 2 Munf. Rep. 452.

In an action of *ejectment*, it was held, that a person could not be a witness to shew that he was the tenant in possession, and not the defendant. *Brent ex. d. Van Cerslandt et al. v. Dyckman*, 1 Johns. Cas. 275.

A *lessor of the plaintiff* in ejectment, cannot be a witness. *Jackson ex. d. Goodrich et al. v. Ogden et al.* 4 Johns. Rep. 140.

In settling the concerns of a partnership, every partner ought to be made a party, and one partner, (though not made a party to the suit,) cannot be a witness for the other, to charge his companion in relation to the partnership. *Waggoner v. Gray's adms.* 2 Hen & Munf. Rep. 603.

In an action by the *shipper* of goods, against the *owner* of the vessel, the *captain* is not a competent witness. *Gardner et al. v. Smallwood*, 2 Hayw. Rep. 349.

A *collector* who has his *commissions* depending on the issue of the suit, is not a witness. *Treasurer of the State v. Null*, Tayl. Rep. 5. Et vide *Hunter v. M'Auslan*, *ibid.* 366.

A person may be a witness for the defendant to prove the truth of the words spoken by the defendant, though the witness himself be sued by the plaintiff for speaking the same words. *Fowler v. Collins*, 2 Root's Rep. 231.

In an action by *A.* against *B.* for falsely affirming *C.* to be a man of property, by which *A.* was induced to trust him and take his note, *C.* is a competent witness for *A.* to prove the facts, though the note is unpaid. *Wilcox v. Wise et al.* 1 Day's Rep. 92.

The owner of a vessel who has over paid money shipped in the vessel to the shipper, and been reimbursed the amount by the master, is a competent witness in an action brought by the master against the shipper for the same money, though in the first instance the owner is liable for the default of the master. *Cortes v. Billings*, 1 Johns. Cas. 270.

In an action for a *penalty* for harbouring slaves, brought against a member of the society of *Shakers*, a member of that society is a competent witness, although all things are held in common by them, and they have a partnership interest in all their concerns as a religious sect. *Wells v. Lane*, 8 Johns. Rep. 361.

Although the manumission of a slave by an infant, with the consent of his guardian, is voidable, yet it renders the slave in the mean time a competent witness for his former master; the power of revoking the manumission being an objection to his credit only. *Rogers v. Berry*, 10 Johns. Rep. 132.

The assignee of a *pre-emption* warrant, is held to be a competent witness, if the facts intended to be proved by his testimony, do not tend to support the title of the party producing him. *Wilson v. Speed*, 3 Cranch's Rep. 283.

Upon the principle that a witness is incompetent, who is interested to defeat the plaintiff's action, because in case the plaintiff recovered, he would be liable to the defendant in a suit in which the record in the previous suit, would be evidence against him, a grantor, who has conveyed land with warranty, is inadmissible in support of his grantee's title. *Jackson ex. d. Caldwell v. Kullenback*, 2 Johns. Rep. 394. *Hermance v. Vernoy*, 6 Do. 5. *Swift v. Dean*, *ibid.* 523.

An attorney in a suit may be examined, though his judgment fee depends on his success. *Newman v. Bradley*, 1 Dall. Rep. 241.

Vide Bent v.
Baker, Ap-
pend.

Ch. III. s. 3. to a witness on this ground, unless he be directly interested, General Rule. that is, unless he may be immediately benefited or injured by

So though he expects to receive a larger fee from his client, if the latter succeeds. *Miles v. O'Hara*, 1 *Serg. & R. Rep.* 32.

If a witness becomes disqualified, his deposition, taken before his disqualification, may be used in the same manner as though he were dead. *Gold v. Eddy adm.* 1 *Mass. Rep.* 1.

A person who has sold personal property, is not a competent witness for the vendee of such property, in a suit brought against him for taking it away. For every vendor of such property is considered as warranting the title of the thing sold, though there is no express warranty. *Heermance v. Vernoy*, 6 *Johns. Rep.* 5.

SEAMEN, &c.

One seaman cannot be a witness for another, in the *Admiralty Court*, if the witness and the party have a common interest in the point in contest. As in the case of the loss of a ship, embezzlement equally affecting the whole crew, &c. *Thompson v. The Philadelphia*, 1 *Peters' Adm. Decisions*, 211.

But where seamen have made similar contracts, the breach or performance whereof may happen in one case, without affecting another, and the like, one may be a witness for another. *ibid.*

One mariner of the same crew, who has signed the same articles, may be a witness for the other, if he does not join in the libel, provided he is not collusively omitted. *Powell v. The Betsey*, 2 *Browne's Rep.* 350.

But in this case, the civil law rule, requiring two witnesses to prove the fact, was adopted. *ibid.*

But in *Hoyt, &c. v. The Wildfire*, 3 *Johns. Rep.* 510, one seaman who had a common interest in the point in dispute, was admitted as a witness. *S. P. Spurr et al. v. Pearson*, 1 *Mason's Rep.* 104.

The master of a vessel, by whom stores had been purchased, and against whom an action was depending for the price, was ruled to be a competent witness to prove the sale and delivery, in an action against the owner of the vessel. *Jf Indoe v. Lunt*, 1 *Browne's Rep.* 85.

In a suit for wages in the *Admiralty Court*, by a seaman against the owners of a vessel, the captain is not a competent witness for the owners. *Jones v. The Phoenix*, 1 *Peters' Adm. Decisions*, 201. *Malone v. The Mary*, *ibid.* 139. *Atkyns v. Burrows*, *ibid.* 244.

So the master of a vessel, who had discharged his mate in a foreign port, is not a competent witness to prove the improper conduct of the mate, in an action for wages, brought by the mate against the owners, without a release from the owners. *Galloway v. Morris et al.* 3 *Yeates' Rep.* 445.

Quere, Whether a release from the owners of a vessel, to their captain, to make him a competent witness, must not be sealed and delivered by all the owners. *ibid.*

The commander of a public armed vessel, which has captured a prize, is a good witness in an action by a seaman against the prize agent to reduce the plaintiff's share of prize money. *Murray v. Wilson*, 1 *Binn. Rep.* 531.

In an action against the owner of a vessel, for unskilful stowage of a cargo, by the mariners, the master and mariners are competent witnesses for the owner. *Arnold v. Anderson et al.* 2 *Yeates' Rep.* 93.

PARTIES TO PROMISSORY NOTES, &c.

In an action by an endorsee against the drawer, the endorser is not a competent witness to prove the hand writing of the drawer, without a release, or its equivalent,

the event of the suit; or unless the verdict to be obtained by his evidence, or given against it, will be evidence for or against him

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—a discharge from liability on the endorsement. *Barnes v. Ball*, 1 *Mass. Rep.* 73. *Rice v. Stearns*, 3 *Do.* 225.

The rule laid down in *Walton v. Shelly*, 1 *Term. Rep.* 300, seems to have been adopted in the *U. States*.

In *Massachusetts* and *New York*, a party to a negotiable instrument, which he has made or endorsed, is not a competent witness to impeach its validity, by proving it originally void. *Warren v. Merry*, 3 *Mass. Rep.* 27. *Parker v. Lovejoy*, *ibid.* 565. *Churchill v. Suter*, 4 *Do.* 156. *Barker v. Prentiss*, 6 *Do.* 430. *Widgely v. Munroe et al.* *ibid.* 449. *Jones v. Coolbridge*, 7 *Do.* 199. *Manning exr. v. Wheatland*, 10 *Do.* 502.

In *New York*, *Winton v. Saidler*, 3 *Johns. Cas.* 185. *Wilkie v. Roosevelt*, *ibid.* 206. *Coleman v. Wise et al.* 2 *Johns. Rep.* 165. *Skilding v. Warren*, 15 *Do.* 270.

But this rule applies exclusively to negotiable instruments. *The Inhabitants of Worcester v. Eaton*, 11 *Mass. Rep.* 368. *Loker v. Haynes*, *ibid.* 498. *Pleasant v. Pemberton*, 2 *Dall. Rep.* 196. *S. C. 1 Yeates' Rep.* 902. *Baring v. Shippen*, 2 *Binn. Rep.* 165. *M'Ferran v. Powers*, 1 *Serg. & R. Rep.* 102. *Croft v. Arther et al.* 3 *Dessauss. Ch. Rep.* 223.

And to those negotiable papers which have been actually negotiated in the usual course of business. *Blagg v. Phoenix Ins. Co. C. C. April*, 1811, *M. S. Rep.* *Baird v. Cochran et al.* 4 *Serg. & R. Rep.* 399. *Hepburn v. Cassel*, 6 *Do.* 113.

It does not apply to a party to a deed of land, who is not interested, to prove the deed fraudulent and void. *ibid.* *Hill v. Payson et al.* 3 *Do.* 559.

Nor does it extend to the endorsement of bills of lading. *Brown et al. v. Babcock et al.* 3 *Mass. Rep.* 29. *Hill v. Payson et al.* *ibid.* 559.

It is competent for an administrator, in an action against him, by the administrator of the promisee of a negotiable note made by his intestate, to prove such note to have been given upon a usurious consideration. *Fox et al. adms. v. Whitney adm.* 16 *Mass. Rep.* 118. *Packard v. Richardson et al.* 17 *Mass. Rep.* 122.

In an action by the endorsee against the maker of a negotiable note, the endorser is not a competent witness to prove usury in the transfer of the note by him. *Manning exr. v. Wheatland*, 10 *Mass. Rep.* 502.

But a party may be a witness, when disinterested, to prove any facts, subsequent to the due execution of the note, which destroys the title of the holder. *Warren v. Merry*, 3 *Mass. Rep.* 27. *Barker v. Prentiss*, 6 *Do.* 430. *Parker v. Hanson*, 7 *Do.* 470. *Fitch v. Hill et al.* 11 *Do.* 286.

In *New York*, *Baker v. Arnold*, 1 *Caines' Rep.* 258. *Woodhull v. Holmes*, 10 *Do.* 231. *Munn v. Swann*, 14 *Do.* 270. *Hulby v. Brown*, 16 *Do.* 70. *Myers v. Palmer*, 18 *Do.* 167.

In *Connecticut*, *Webb v. Danforth*, 1 *Day's Rep.* 301.

In *Pennsylvania* he cannot be a witness to prove there was no consideration for it. *Stille v. Lynch*, 2 *Dall. Rep.* 194. Et vide *Allen v. Holkins*, 1 *Day's Rep.* 17. *Bearing v. Ruder*, 1 *Hen. & Munf. Rep.* 175.

In an action by the endorsee against the drawer of a note, the endorser is not a competent witness, without a release from the endorsee. *Barnes v. Ball*, 1 *Mass. Rep.* 73. *Rice v. Stearns*, 3 *Do.* 225.

In an action by an endorsee against an endorser, the maker, a certificated bankrupt, under a commission issued since the making of the note, and released by the endorser, is a competent witness to prove that he has paid the note to the plaintiff. *Warren v. Merry*, 3 *Mass. Rep.* 27. Et vide *Peirce v. Butler*, 14 *Do.* 203.

In an action by the endorsee against the drawer, the endorser (who was the payee)

Ch. III. s. 3. in another action in which he may afterwards be a party.(r)
General Rule. Any smaller degree of interest, as the possibility that he may be

1 T. R. 163.

liable to an action in a certain event, or that standing in a similar situation with the party by whom he is called, the decision in that cause, may, by possibility, influence the minds of the jury in his own, or the like; though it furnishes a strong argument against his *credibility*, does not destroy his *competency*.

is a competent witness to prove that the endorsement was made in trust for himself, without any recourse to himself. *Barker v. Prentiss*, 6 *Mass. Rep.* 430.

The *payee* of a note, who has endorsed it, with a saving of his own liability, is a competent witness to prove an alteration of the note since its execution. *Parker v. Hanson*, 7 *Mass. Rep.* 470.

The *drawer* of a bill of exchange, is not a competent witness to prove its payment or acceptance. *Huntingdon v. Champlin*, *Kirb. Rep.* 166.

Quere, Whether the *drawer* of a bill of exchange be a competent witness for the endorser, in an action against him. *Wilson v. Lenox*, 1 *Cranch's Rep.* 194.

So a *drawer* is a competent witness to prove that at the time of drawing the bill he communicated certain conditions and restrictions as to his right to draw the bill. *Storer v. Logan*, 9 *Mass. Rep.* 55.

An *endorser* is a competent witness in an action by the *endorsee* against the maker to prove that the note was, after the endorsement, fraudulently put into circulation. *Woodhull v. Holmes*, 10 *Johns. Rep.* 231. Et vide *Skilding et al. v. Warren*, 15 *Do.* 270. *Powell v. Waters*, 17 *Do.* 176. *Tuthill v. Davis*, 20 *Do.* 285. *Owen v. Mann*, 2 *Day's Rep.* 399.

In an action by the *endorsee* against the *first endorser*, the plaintiff offered an intermediate endorser, as a witness, and to render him competent, his endorsement was proposed to be struck off the first and third sets of the bills, the second being lost, yet as that set might be in the hands of a *bona fide* purchaser, the Court held he would still be an incompetent witness. *Steinmetz et al. v. Currey*, 1 *Dall. Rep.* 270. —Am. Ed.

(r) In an action upon a bond for the liberties of the prison yard, the Sheriff or goaler is a competent witness to prove that the creditor assented to the debtor's liberation, as the verdict in this case cannot be given in evidence, in an action against the witness, for the debtor's escape. *Bridge v. M^r Lane*, 2 *Mass. Rep.* 520.

In *Massachusetts*, the grantor of land with warranty, is a competent witness for the grantee, in an action brought by him for the land, against one who does not claim to hold under the *same grantor*; the verdict in the present suit could not be given in evidence, in an action brought against him on a breach of covenant. *Twambly v. Henley*, 4 *Mass. Rep.* 441.

In *Connecticut* he is inadmissible. *Abby v. Goodrich*, 3 *Day's Rep.* 433.

Proprietors admitted to prove the title to lands, to which, for a valuable consideration, they had quit claimed, though it was objected, if the defendant's should fail, they would be entitled to recover of the proprietors. *Lay v. Hayden*, 2 *Roof's Rep.* 317.

A person acknowledging that he thought himself interested in the event of the suit, is not a competent witness, though in fact not interested. *Richardson's exrs. v. Hunt, & Munf. Rep.* 148.

Sed contra, *Fernsler v. Carlin*, 3 *Serg. & R. Rep.* 130. *Long v. Bailie*, 4 *Do.* 226.

A witness is competent, though another swore he heard him confess, some years

Thus, in one case, where *A. B.* and *C.* having, in a joint deposition in Chancery, sworn to the same fact, the party injured brought three several actions on the Statute of *Eliz.* for perjury; and in another, where several persons having sworn to the same fact, were severally indicted; it was permitted to one to give evidence, on the trials of the others in their favour; for until conviction, he could not be rejected as infamous; and he was

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Gunstone v. Downs, 2 Roll. Abr. 685. Bath v. Montague, cited Fortescue's Rep. 247.

before, that he would be a great loser if the plaintiff miscarried in the suit. *Les. of Pollock v. Gillespie et al. & Yeates' Rep.* 120.

Supposing the competency of a witness to depend upon his own opinion of his interest, it is only his opinion at the time of taking the oath that can be considered. Therefore, proof that a witness, offered by the defendant, had said, about two years before the trial, "that every cent which should be recovered in the action, would be deducted out of the estate of his wife," does not render him incompetent. *Fernalter v. Carlin*, 3 Serg. & R. Rep. 130.

GRANTOR IN A DEED, &c.

In *New York*, the grantor in a warranty deed is incompetent on the ground of interest. *Jackson ex. d. Caldwell v. Hallenback*, 2 Johns. Rep. 394. *Swift v. Dean*, 6 Do. 523.

So in *Virginia*. *Moor v. Campbell*, 1 Munf. Rep. 600. See vide *Ross v. Mcr-vell*, 3 Munf. Rep. 170.

But where he has been released he is. *Jackson ex. d. Bond et al. v. Root*, 13 Johns. Rep. 60.

But he is a competent witness in an action of trespass by the grantee, although the defendant justifies under a right of freehold. *Van Nuyse v. Terhune*, 3 Johns. Cas. 82.

The widow of one deceased, is a competent witness in a suit concerning her husband's lands. *Jackson ex. d. Grirwold v. Bard*, 4 Johns. Rep. 230. *Jackson ex. d. Van Deusen v. Van Deusen*, 5 Johns. Rep. 144. *Den ex. d. Beatty v. ———* Tayl. Rep. 9.

Quere, in *Pennsylvania*. *Les. of Sweitzer v. Mease et al.* 6 Binn. Rep. 500.

In *Pennsylvania*, a grantor who has warranted merely against persons claiming under himself, is a competent witness for the grantee against a party not claiming under the witness. *Les. of Gratz v. Ewalt*, 2 Binn. Rep. 95. *Les. of Cain v. Kindersoen*, *ibid.* 108. *Les. of Henry v. Morgan*, *ibid.* 400. *Les. of Sweitzer v. Mease et al.* 6 Do. 500. *Johnson v. Eckart*, 3 Yeates' Rep. 427. *Les. of Shields v. Buchanan et al.* 2 Do. 219.

But one with general warranty, is a good witness to establish a title in opposition to that of his vendee. *Work et al. v. Mincloy*, 2 Serg. & R. Rep. 415.

So where one has sold land with warranty against the plaintiff, he is a good witness for him, because he swears against his own interest. *Salmon et al. v. Rance*, 3 Serg. & R. Rep. 315.

So where there is neither covenant of title or warranty. *Dorsey v. Jackman*, 1 Serg. & R. Rep. 42. Et vide *Busby v. Greenplate*, 1 Strange's Rep. 445.

A vendor of cattle, who had agreed to sell them to *A.* for cash, but on his failing to comply with the terms, told them to *B.* was ruled to be a competent witness in an action of replevin for the cattle, brought by *A.* against *B.* *Miller v. Little*, 1 Yeates' Rep. 28.

One who has conveyed land subject to a right of way, with general warranty, is a competent witness for the defendant, in an action for disturbing the right, to prove

Ch. III. s. 3. Interest. not directly interested, inasmuch as the acquittal of the others would be no evidence for him. So a woman, whose husband was under sentence of death, was held to be a competent witness on an indictment against others for the same offence, though she confessed that she had hoped the conviction of the others might procure a pardon for her husband; for such pardon was not a necessary consequence of that conviction.(s)

Radd's Cas.
Leach. Cro.
Cas. 151.

Parties injured in criminal prosecutions.

Many cases have arisen, and many contradictory decisions are to be found in the books, on the question, how far persons who have been defrauded of securities, or injured by a perjury, or other crime, can be witnesses in prosecutions for those offences, the event of which might possibly exonerate them from the obligation they are charged to have entered into, or restore to them money which they have been obliged to pay? But the general principle now established is, that "the question in a criminal prosecution, or penal action, being the same with that in a civil cause in which the witness is interested, goes generally to the credit, unless the judgment, in the prosecution where he is a witness, can be given in evidence in the cause wherein he is interested.(t)* And if, as I have elsewhere endeavoured

Ante, p. 78.

an agreement for the removal of the road on a certain event. *Lentz v. Stroh*, 6 Serg. & R. Rep. 34.—AM. ED.

(s) As in a criminal case a *particeps criminis* is admitted as a witness, so in a civil case a *particeps fraudis* may be. *Churchill v. Suten*, 4 Mass. Rep. 156. *Bean v. Bean*, 12 Do. 90.—AM. ED.

(t) The person who is entitled to a restitution of possession, in case of a conviction of forcible entry, cannot be a witness to support the indictment. *State v. Fellows*, 2 Baym. Rep. 340. Et vide *State v. Hamilton*, *ibid.* 283.—AM. ED.

* The cases on this point are so contradictory, that it is impossible to reconcile them. In *Watt's case*, *Hard.* 831, it is laid down as a general rule, that in the case of perjury, he who is injured by the perjury, cannot be a witness on an indictment for it; and in the case of *Rex v. Whiting*, 1 Salk. 288, it was held, that a woman who had been induced by the fraud of the defendant, to sign a note of hand, could not be a witness against him, because his conviction would influence the jury on the trial of an action on the note, though the record could not be given in evidence. In the case of the *King v. Ellis*, 2 Stra. 1104, a defendant in an ejectment, against whom the verdict was given, was held not to be a witness on an indictment for perjury committed on the trial of such ejectment: and in the case of the *King v. Menez*, 2 Stra. 1043, it was determined, that a person who had filed an injunction bill in the Exchequer, to stay proceedings in an action brought on a promissory note, could not be a witness to prove perjury committed in an answer to that bill. *Paris's case* (1 Vent. 49, and 1 Sid. 431) is directly contrary to the *King v. Whiting*; the only difference between the two cases is, that one information was for fraudulently procuring a warrant of attorney to confess judgment, the other for so procuring a promissory note. And in the *King v. Moise*, 1 Stra. 595, which was an indictment for tearing a note, the payee of the note was admitted to prove the

to shew, the verdict on an indictment on the trial of which a Ch. III. s. 3. man is examined as a witness, can in no case be evidence for him in a civil cause; it will follow, that in every case, except those which by inveterate practice may be considered as form-

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in criminal
prosecutions.

case. The case of the *King v. Whiting* was doubted by Lord HARDWICKS in the *King v. Bray*, *Cas. temp. Hard.* 358; and it, together with the cases of the *King v. Nunes* and the *King v. Ellis*, are said by Lord MANSFIELD in 4 *Burr.* 8255, to have been overruled by Lord Chief Justice LEE, in the case of the *King v. Broughton*, 3 *Str.* 1329; and the rule laid down by Lord MANSFIELD, in that book, is, as above stated, "that the question in a criminal prosecution, being the same with a civil cause in which the witness is interested, goes generally to the credit; unless the judgment in the prosecution, where he is a witness, can be given in evidence in the cause where he is interested." A distinction, however, may be made between the cases of the *King v. Whiting*, &c. and the case of the *King v. Broughton*. In the first three cases, the person who was called as a witness, might eventually have been benefited, because in the *King v. Whiting*, the note was a good instrument till the defendant was convicted. In the *King v. Ellis*, the defendant in the ejectment failed at the trial, and he might hope to obtain a verdict in another ejectment, if he succeeded in convicting the defendant on the indictment for perjury; and in the *King v. Nunes*, the suit in the Exchequer was still pending. In the case of the *King v. Broughton*, the suit in Chancery was ended, and ended in the manner most agreeable to the interest of the witness; for the Lord Chancellor, not believing *Broughton*, the defendant in that indictment, had decreed for the witness, so that the witness could not have even the hope of benefiting himself by convicting *Broughton*. The following case clearly establishes the position laid down by Lord MANSFIELD, in the case of *Abrahams v. Bunn*, but at the same time as clearly overturns the case of *Rex v. Whiting*, and cannot be distinguished from it.—It was the case of *Bartlet v. Pickeregill*, (since reported, *Cox's Cases*, 15) and is cited by Lord MANSFIELD, 4 *Burr.* 8255, as follows: "The defendant bought an estate for the plaintiff. There was no writing, nor was any part of the money paid by the plaintiff. The defendant articulated in his own name, and refused to convey, and by his answer denied any trust; parol evidence was rejected, and the bill was dismissed. The defendant was afterwards indicted for perjury, tried at York, and convicted on the evidence of the plaintiff, confirmed by circumstances, and the defendant's declarations. The plaintiff then petitioned for a supplemental bill in the nature of a bill of review stating the conviction. But the petition was dismissed, because the conviction was not evidence." In the case of *Abrahams v. Bunn*, above mentioned, the borrower of money was held a good witness to prove the whole case in an action for usury against the lender, and the authority of this case was fully recognised in the late case of *Smith v. Prager*. But in an action against the assignee of a bankrupt, for taking usurious interest on a loan to the bankrupt, he not having obtained his certificate, nor paid the money, was not permitted to prove the usury. *Martin v. Drayton*, 3 *T. Rep.* 496. See also the *King v. Dalby*, *Peak. N. P.* 13, where Lord KESWICK rejected the testimony of a person who had been injured by a perjury in an indictment for that offence. This question was finally laid at rest in the *King v. Boston*, 4 *East* 573, where the defendant having been convicted of perjury, in an answer to an injunction bill, and the plaintiff in the bill, and his wife, having (after objection) been admitted as witnesses on the trial, the Court of King's Bench decided that they were competent witnesses: because in no case where a person has been examined on the trial of an indictment, can the verdict on that indictment be used for him. They expressly referred to the case of *Bartlet v. Pickeregill*, and recognised its authority. See also the cases cited ante, p. 78.

Ch. III. s. 3. ing exceptions to this general rule, the party injured is a competent witness.^(u)
 Parties injured in criminal prosecutions.

But though this is the general rule, an exception to it seems to be established in the case of indictments for *forgery*; for it has in many cases been decided, that a person, whose hand-writing has been forged to an instrument, whereby, if good, he would be charged with a sum of money; or one who has paid money in consequence of such forgery, cannot be a witness on the indictment for the purpose of proving the forgery, though he may to facts quite collateral to it; or in civil cases where the same question arises.^{(x)*}

Hunter v.
 King,
 4 B. & A. 209.

(u) The question in a criminal prosecution, being the same with a civil cause, in which the witness is interested, goes generally to his credit, unless the judgment in the prosecution can be given in evidence in the cause where he is interested. *State v. Hasset, Tyl. Rep. 55.*

On an indictment for usury, the borrower of the money is a competent witness for the Commonwealth, if he is not entitled to a moiety of the penalty as informer, notwithstanding he has never repaid the money borrowed. *Commonwealth v. Frost, 5 Mass. Rep. 53.—Am. Ed.*

(x) In *Vermont*, the person whose name is alleged to be forged, cannot be admitted as a witness for the prosecution, in an indictment for the same. *State v. A. W. 1 Tyl. Rep. 260.*

In *Connecticut*, the party injured cannot be a witness to prove the forgery. *State v. Brunson, 1 Root's Rep. 307. State v. Blodget, ibid. 534.*

Sed quere, Whether the rule is not altered by later decisions.—*Ed.*

But the hand writing of the person, in whose name the forgery is alleged to have been committed, will be allowed to go to the jury. *State v. Nettleton, ibid. 308.*

And the person to whom the forged instrument was passed, is a good witness. *ibid.*

The person whose name was forged, was released by the bank, who paid the money, and held to be a competent witness. *The People v. Howell, 4 Johns. Rep. 296.*

In *Massachusetts*, it has been held that a party by whom an instrument purported to be made, was not competent to prove it forged, unless the instrument be produced on the trial. *Commonwealth v. Hutchinson, 1 Mass. Rep. 7.*

In the case of the *Commonwealth v. Snell, 3 Do. 32*, where the instrument alleged to have been forged was secreted, to protect the offender, the person whose name is charged to have been forged, and who had seen and copied the instrument, is a competent witness to prove it forged; and the production of the instrument itself will be dispensed with.

But in *Commonwealth v. Waite, 5 Do. 261*, the Court said, as the person whose receipt was forged, could neither gain nor lose by the event of the trial, he was a competent witness. From the report of the case, the receipt did not appear on the trial.

In *Pennsylvania*, the party injured is a competent witness. *Respublica v. Keating, 1 Dall. Rep. 110. Ibid. v. Ross, 2 Do. 239. S. C. 2 Yeates' Rep. 1. Ibid. v. Wright, 1 Do. 401. Ibid. v. Furrell, Addis. Rep. 246.—Am. Ed.*

* See the several cases on this head, collected in the Digest, at the end of this section, letter (D.)

In cases where the party injured cannot by possibility derive any benefit from the verdict in the prosecution, as in indictments for assaults, and the like personal injury, his competency has never been doubted. (y) (1)

From what has been already said, it may be taken as a general rule, that a party in a cause cannot be examined as a witness, for he is in the highest degree interested in the event of it;* and though he be barely trustee for another, he has still an interest sufficient to render him incompetent, for he is personally answerable in the first instance for the costs of the suit, and the *chance* he may have of indemnity from the person for whom he acts, does not remove the interest which the *certain* liability creates in him. (z) But where a man is not, in point of fact, at all interested, he may be examined; as where members of a charitable institution are defendants in their *corporate character*, there is no objection to an individual member being examined as a witness for the corporation; because in this case he is giving evidence for the public body only, and cannot be in any manner affected by the verdict; for the costs cannot be levied on him personally, but can only be recovered from the funds of the corporation.

Ch. III. s. 8.
Of parties in a cause and witnesses of necessity.

(1) Watts's case, Hard. 331.

Rex v. St. Mary Magdalen, Bermondsey, 3 East. 7.

Weller v. Governors of Foundling Hosp. Peak. Cas. 153.

(y) *Quere*, Whether in every criminal case, a witness who is not interested in the event of the cause, is not a competent witness. *The People v. Howell, & Johns*. Rep. 296.

On an indictment for a conspiracy, in inveigling a young girl from her mother's house, and she being intoxicated, procuring the marriage ceremony to be recited between her and one of the defendants, the girl is a competent witness to prove the facts. *Respublica v. Hewes et al. & Yeates* Rep. 114.

One party cannot use as evidence his own deposition taken in another action, by the other party; for it cannot be inferred from the taking the deposition, that he admits the statement contained in it. *Hovey v. Hovey*, 9 Mass. Rep. 216.—AM. ED.

* But where one party has agreed to take the affidavit of the other as to a particular fact, and such affidavit has been made accordingly, this is to be taken, for the purpose of the cause, as conclusive evidence of the fact so sworn to, vide *Button v. Prettman*, Sir T. Bayn. 153; aliter, if the affidavit be only engrossed and not sworn, *Stevens and others v. Walker*, Peak. N. P. 137. Vide ante 21, note (*.) And in a late case, where one of the parties had by consent been examined at Nisi Prius, the Court of Common Pleas refused to set aside the verdict. *Norden v. Twibill et al.* 1 Taunt. 378. (But in New York, it was decided that the *lesser* of the plaintiff in ejectment was not a good witness. *Jackson ex d. Goodrich et al v. Ogden et al.* 4 Johns. Rep. 140.—AM. ED.)

(z) A mere naked trustee, is a competent witness in a controversy, in which a creditor seeks to set aside the deed, on the ground of fraud. *Harvey, &c. v. Alexander, &c.* 1 Randolph's Rep. 219.

A mere naked trustee without interest, is a competent witness. *Main v. Newson*, Anth. N. P. 11.—AM. ED.

Ch. III. s. 3.
Parties in a
Cause, &c.

Case of Corporation
of London,
1 Vent. 351.

So in questions as to the rights or immunities of a *corporation*, the evidence of individuals who are not privately interested, though members of the city, may be received: But where corporators, as such, have private interests, as to be free of toll, rights of common, &c. these being really and substantially interested in the event of the cause, are no witnesses.*^(a)

Lord Howard
v. Bell,
Hob. 92.
Sandy v.
Custom-house
Officers,
Skin. 174.

* For the instances in which corporators are admitted as witnesses, see Digest at the end of this section, letter (A.)

(a) Where a corporation are parties, or immediately interested in the question, no member of it can be a juror or witness. *Respublica v. Richards*, 1 Yeates' Rep. 430. *Nason v. Thatcher et al.* 7 Mass. Rep. 398.

But on an indictment for casting away a vessel, to the prejudice of a corporate body who had underwritten her, a stockholder may be a witness for the prosecution. *U. States v. Johns*, C. C. April, 1806. *M. S. Rep. S. C. 4 Dall. Rep.* 415.

So a stockholder in an incorporated company, plaintiff in the suit, was admitted as a witness to inform the consciences of the Court as to a collateral fact. *Schuyllkill Navigation Company v. Deffenbach et al.* 1 Yeates' Rep. 367.

An inhabitant of a city is not a competent witness in support of a prosecution, where the penalty accrues to the benefit of the city. *Commonwealth v. Keighler*, Supreme Court, 1797, *M. S.*

A taxable inhabitant is a competent witness for the Commonwealth, in an indictment for selling spirituous liquors without a license; but one who has actually been assessed or rated, is not. *Commonwealth v. Baird*, 4 Serg. & R. Rep. 141.

By the 6th sec. of the Act of 27th Jan. 1819, 7 Reed's Laws Penn. it is provided, that no person shall be excluded from being a witness, arbitrator, Judge, or juror, in any prosecution, under that or any other penal Act of Assembly, by reason of being subject to the payment of county rates or levies for the poor, in the city or county of Philadelphia.

It is stated in *Swift's Evid.* 57, that in England there is no general rule adopted when members of corporations shall be witnesses in actions for or against corporations; but that every case stands on its own circumstances.

The inhabitants of an incorporated society, to whom property is devised, for the support of a school, are competent witnesses, to attest the will. *Cornwell v. Isham*, 1 Day's Rep. 35.

Where a corporation, created for pious and charitable uses, were made the residuary legatees in a will, its members were received as witnesses, on the question of the sanity of the testator, which was at issue between the executor and the heir at law. *Nason v. Thatcher et al.* 7 Mass. Rep. 398.

The mere liability to be rated for the support of the poor of the town, will not render such a person an incompetent witness, in a cause in which the town is interested, as to the maintenance of a pauper. *Falls v. Belknap*, 1 Johns. Rep. 486.

The inhabitants of a town were admitted as witnesses in a case in which they were interested, on the ground that their interest was a corporate one, and the transaction being in said town, where other evidence might not reasonably be expected. *Smith v. Barber*, 1 Root's Rep. 207.

Where some of the proprietors of the common land, in the town of Stratford, were to prove the boundaries, the Court said, that members of a corporation, are admitted to testify in cases where they are interested from necessity, but bounds are of public notoriety, and may be known to the other inhabitants of the town, as well as to the proprietors, and they were accordingly rejected. *Skellon v. Tomlinson*, 2 Root's Rep. 132.

But there are some instances, where persons substantially interested, and even parties in a cause, are permitted to be examined, from the necessity of the case, and absolute impossibility of procuring other testimony. (b)

Ch. III. s. 3.
Parties in a
Cause, &c.

In an action on the Statute of *Winton*, the party robbed is a

Where a suit was carried on by a board of freeholders, who in their corporate capacity had advanced money to carry it on, a member of the board was held a competent witness, being merely liable in his corporate and not in his personal capacity. *Schank v. Stevenson*, 1 Pen. Rep. 387.—AM. ED.

(b) Vide ante, for Book Debts, &c. p. 30, n.

In summary inquiries, such as questions of bail, the evidence of parties, though interested in the event of the suit, have always been received. *Bank of Pennsylvania v. Hadfeg et al.* 3 Yeates' Rep. 560.

A person interested in the question, may be admitted to prove a collateral fact, such as the identity of blocks taken from marked trees, in a question of survey. *Les. of Cox v. Ewing et al.* 4 Yeates' Rep. 429. Et vide *Davis v. Hampton*, 2 Do. 289.

It is the universal practice in *Pennsylvania*, for the party to the suit to prove the service of notice to produce papers, and to prove notice of taking of depositions. *Jordan v. Cooper et al.* 3 Serg. & R. Rep. 564. *Douglas's les. v. Sanderson*, 1 Yeates' Rep. 15. S. C. 2 Dall. Rep. 116.

The judgment of a Justice reversed, because he had given judgment in favour of the plaintiff, founded on the evidence of the party. *Sharpe v. Thatcher*, 2 Dall. Rep. 77.

A plaintiff is a good witness to prove the service of a notice on a justice of the peace, thirty days before process issued, under the Act of 21st March, 1772, 1 Sm. Laws, 364. *Kidd v. Riddle*, 2 Yeates' Rep. 444.

The affidavit of the landlord of the defendant in ejectment, was admitted to prove the absence of a material witness. *Hunter's les. v. Kennedy*, 1 Dall. Rep. 81.

The plaintiff is a witness to prove that a material witness was unable to attend, from advanced age and indisposition, in order to entitle him to read his de- *Les. of Morris v. Flora*, cited 2 Dall. Rep. 117. 1 Yeates' Rep. 16.

An affidavit is evidence, on a rule to shew cause of action, by the practice of our courts, that it cannot be received on the argument of the rule. *Hoar v. Mulvey*, 10 T. Rep. 145.

A person who had given a bond of indemnity to the plaintiff against the service of a notice, was held an incompetent witness to prove the service of notice on certain papers at the trial. *Butler v. Warren*, 11 Johns. Rep. 145.

A subscribing witness to a deed, is not in proof of his hand or signature, if he is a party to the deed. *Yeates' Rep.* 116.

A witness must be sworn to the truth of his testimony. *Yeates' Rep.* 116.

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Ch. III. s. 3. witness.(c)* And, on the same principle of necessity, it has been
 Necessity. holden, that persons, who become interested in the common

Though a party may prove *ex necessitate* the loss of a deed, yet he cannot prove its contents. *Seekwright ex. d. Wright v. Bogan*, 1 *Hayw. Rep.* 176. Et vide *Blanton v. Miller*, *ibid.* 4. *Park v. Cochran*, *ibid.* 411. *Garland v. Goodlee*, 2 *Do.* 351.

But he is not competent to prove the hand writing of witnesses to a deed. *Les. of Peters et al. v. Condron*, 2 *Serg. & R. Rep.* 80.

Nor to prove the hand writing of the person by whom entries in his book were made, and who is since dead, although he may the fact of his death. *Karsper v. Smith*, 1 *Browne's Rep. Ap.* liii.

A debtor, defendant, who alleges to have enclosed money to his creditor by mail, which did not come to hand, cannot prove by his own oath that he did so enclose it. *U. States v. Wells*, C. C. Oct. 1806, *M. S. Rep.*

An executor, defendant, may be examined to prove the state of papers offered in evidence, when he found them, and where they were found, from the necessity of the case. *Lukins's adms. v. De Haas's exrs.* 2 *Yeates' Rep.* 37. *S. P. Standley et al. v. Weaver et al.* *ibid.* 256.

If one of the parties in a suit is sworn and examined at the request of the other party, the latter cannot afterwards object to it. *Miller v. Starks*, 13 *Johns. Rep.* 517.

In *Connecticut*, a party cannot be a witness in his own favour, even in Chancery, any more than at Law. *Webb v. Fitch*, 1 *Root's Rep.* 177. *Payne v. Payne*, *ibid.* 367.

Except in an action for a book debt under the Statute. 1 *Day's Rep.* 104. *Tyler v. Scovel*, 1 *Root's Rep.* 523.

In an action for giving the plaintiff a dose in some tody, the mother was allowed to give evidence what the plaintiff had said the next morning, from the necessity of the case. *Goodwin v. Harrison*, 1 *Root's Rep.* 80.

Where the answer to the defendant in Chancery, contains a direct and positive denial of the allegations in the complainant's bill, it cannot be outweighed by the deposition of one witness only unsupported by corroborating circumstances. *Beatty v. Smith et al.* 2 *Hen. & Munf. Rep.* 395. *Maupin v. Whiting*, 1 *Call's Rep.* 324. *Heffner v. Miller et al.* 2 *Munf. Rep.* 43.

A commission to examine one of the defendants as a witness, should be awarded, on the motion of the plaintiff, as a matter of course, saving all just exceptions. *Plainville v. Brown et al.* 4 *Hen. & Munf. Rep.* 482.

But it cannot issue at the instance of a defendant, to examine the plaintiff as a witness. *Ross v. Carter*, *ibid.* 488.—AM. ED.

(c) A person entitled to a reward upon a conviction, is a good witness. *State v. Coulter*, 1 *Hayw. Rep.* 3. *State v. Bennet*, 1 *Root's Rep.* 249.

In *South Carolina*, where usury is set up as a defence, the defendant is a competent witness to prove the usury, unless the plaintiff will deny on oath the truth of what the defendant offers to swear against him. *Luyten v. Haygood*, 2 *Bay's Rep.* 177.

In *Massachusetts*, in a suit between the original debtor and creditor, usury may be proved by the oath of the defendant. *Binnay v. Merchants*, 6 *Mass. Rep.* 190.

The inhabitants of a town are good witnesses in a cause in which the town is interested. *Schenck et al. v. Corsham County*, 1 *Coxe's Rep.* 120. *The Overseers of the Poor of Orange v. The Overseers of Springfield*, 1 *South. Rep.* 186.—AM. ED.

* As this is an exception to the general rules of law, the grounds on which the decision proceeded, and the extent of it, ought to be accurately understood. The

course of business, and who alone can possibly have knowledge of a fact, may be called as witnesses to prove it; as in the case of a servant, who has paid money, or a porter who, in the way of his business, delivers out or receives parcels; though the evi-

Ch. III. s. 3.
Necessity.

Bul. N. P.
289.
Spencer v.
Goulding,
Peak. N. P.
Cas. 129.

only case on the subject is in 2 *Roll. Abr.* 685, 686, and from that it has been laid down in general terms, in all subsequent books, where the subject has been treated of. The case is reported in Rolle as follows:—"In an action against a hundred brought by the master, being a carrier, for a robbery committed on his servant in the absence of the master; *quere* whether the master, being the plaintiff in the action brought, may be a witness to prove that he delivered the monies of which his servant swears he was robbed, before his servant set out on his journey in which he was robbed; for this might be proved by any other, and no person is to be a witness in his own cause, but for necessity; as if he himself had been robbed, although that he was plaintiff, yet he might be a good witness to prove himself to have been robbed, and of what sum or things, and also to prove that he gave notice to the next ville, and levied hue and cry, for this is of necessity for default of other proof. But as to proving the delivery of the money to his servant before the robbery, and before he set out on his journey, this might be proved by any other, as well as by him, although it was objected, that it is not safe nor usual for men to call witnesses when they deliver money to carry on a journey, on account of the danger of discovery; and for this reason, *per Curiam*, against my opinion, it was ruled, that he should be received as a witness." *Bennet v. Hundred of Hertford, Mich.* 1650. A similar case occurred before Mr. J. CHAMBERLAIN, where a mob having robbed the plaintiff's barge of corn which was carried in it, that part of the case was proved by the servant; but he not knowing the quantity on board, and this case being cited from *Bul. N. P.* 197, his Lordship, on the authority of it, allowed the plaintiff to be examined to prove that fact. *Porter v. Hundred of Ragland, Monm. Spr. Ass.* 1802, *M. S.* Note in the Stat. 8 *Geo.* 2, c. 16, s. 15, it is recited, that by the laws then in being the person robbed was a good witness, and the hundredors are thereby made witnesses for the defendant.

Johnson v. Browning, 2 Mod. 216. In an action for malicious prosecution, where nobody was by at the time the supposed felony was committed but the defendant's wife, who could not, in this case, be a witness to prove the felony committed. *HOLT, C. J.* allowed her oath, which she made at the trial of the indictment, to be given in evidence to prove a felony committed; for otherwise one that should be robbed, &c. would be under an intolerable mischief; for if he prosecuted for such a robbery, &c. and the party should, at any rate, be acquitted, the prosecutor would be liable to an action for malicious prosecution, without a possibility of making a good defence, though the cause of prosecution was ever so pregnant. *Cobb v. Carr, B. N. P.* 14, *S. P.*

These are the only cases, I believe, in the books, where parties to the cause have been permitted to give evidence for themselves; and, in the latter case, it seems to have been taken for granted, that the party could not be examined, though her former evidence was admitted. It is probable that, in this case, the evidence was given by the plaintiff to shew the prosecution, and that being so produced, the Judge considered it as evidence for the defendant; and accordingly, in a late case at *Nisi Prius*, where to prove a malicious charge made before a magistrate, the plaintiff produced the defendant's information, Mr. Baron RICHARDS observed, that such information being made upon oath, must be presumed to be true till the contrary was proved, and as the plaintiff gave no evidence to shew his innocence of the charge, directed the jury to find for the defendant. *Carter v. Thomas, Glo. Spr. Ass.* 1816.

Ch. III. s. 3.
Necessity.

dence, whereby he charges another with the money or goods, exonerates himself from his liability to account to his master for them; for if this interest were to exclude testimony, there would never be any evidence of such facts.(d)*

(d) A shipmaster having received a trunk of goods on board of his vessel, to be carried to another port, which on the passage he broke open and rifled of its contents, the owner of the goods, after proving the delivery of the trunk and its violation, was admitted as a witness in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. *Herman v. Drinkwater*, 1 *Greenl. Rep.* 27.

An agent or servant, in whose favour a written order to receive goods is given, and who endorses a receipt on the order, may be a witness from necessity in a suit relative to the goods, especially if he be offered a release. *Burlingham v. Deyer*, 2 *Johns. Rep.* 189.

Every agent is a competent witness, *ex necessitate*. *Cortes v. Billings*, 1 *Johns. Cas.* 270. *Mackay v. Rhinelanders et al. ibid.* 408. *Jones v. Hake*, 2 *Do.* 60. *Abbot v. Sebor*, 3 *Do.* 39. *Stewart v. Kip*, 5 *Johns. Rep.* 256.

An agent who had received several sums of money on account of trespasses alleged to have been committed on the lands of his principal, and which he promised to refund in case he should not recover in an action against a particular trespasser, is a competent witness in that action. *Renaudet v. Crocker*, 1 *Caines' Rep.* 167.

An agent or broker, authorised to purchase goods on certain terms, is a competent witness in a suit between the vendor and vendee; for, if he had exceeded his authority, he would, at all events, be liable to the losing party, and if he had not, he would be liable to neither. *Bailey et al. v. Ogden*, 2 *Johns. Rep.* 399.

An agent is a competent witness to prove that he paid a sum of money to the agent of the plaintiff's assignors. *Meade v. Tate*, 2 *Call's Rep.* 231.

If one as agent for another, purchase a bill of exchange, and endorse it over to his principal, the latter may call him as a witness, if he first prove him to have been merely an agent. *Murray v. Carrot*, 3 *Call's Rep.* 373.

A broker, who negotiated the business between the borrower and lender, though the payee of the note is a competent witness to prove the usurious transaction. *Payne v. Trezevant*, 2 *Bay's Rep.* 23.

An agent, who orders work for another, is a good witness, *ex necessitate*. *Trouard v. Martin*, *Orleans T. Rep.* 80.

A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal, free from the claim of any person whomsoever. *Blair v. Oxles*, 1 *Munf. Rep.* 38.

Et vide ante, p. 43, note (i); post, Digest of Cases at the end of this section, letter (B.)—A. x. Ed.

* For other instances, in which persons have been admitted witnesses from necessity, see Digest of Cases at the end of this section, letter (A.) plac. 8. (B.) plac. 1, 2, 3, 4, 5, 6, 13. (F.) plac. 2.

On this principle of necessity it has been said, that in informations on the Stat. 15 Car. 2, against hunting deer, the Statutes of Conventicles, and the Act of Navigation, the informer shall be a witness, though part of the penalty goes to him. *Gibb. Law. Ev.* 132. The only case which supports this doctrine is that of *Jennings v. Hankey*, 3 *Mod.* 114; but the many cases collected by Mr. Nolan, in his note on *Rex v. Tilly*, 1 *Str.* 315, fully establish the contrary position. In addition to these may be mentioned, the case of *Rex v. Blackmore*, 1 *Esp. Cas.* 95, where a witness

It frequently happens that persons are made defendants with others, for the mere purpose of excluding their testimony. In this case, if no evidence whatever be given against the person so improperly made defendant, he will be entitled to an acquittal immediately the plaintiff has closed his case, and may then be examined as a witness, on behalf of the other defendant; and in like manner, a defendant in trover, who had suffered judgment by default, was permitted by Lord KENYON to give evidence to prove his co-defendant (who pleaded) not guilty.⁽¹⁾ But a defendant who suffered judgment by default, in an action on contract, is not a witness for the plaintiff to charge the other defendant, he being interested, to make him liable to contribution.⁽²⁾ So on an indictment against two for an assault, one submitted and was fined, and he also was admitted as a witness for the other.^{(3)(e)} But if there be the slightest evidence to charge

Ch. III. s. 3.
Parties in a
cause.

Gilb. Law
Ev. 134.

(1) Ward v.
Haydon,
2 Esp. 552.

(2) Brown v.
Brown, 4
Taunt. 752.
Sed vide ante,
136.

(3) Rex v.
Fletcher,
1 Stra. 633.
Gilb. Law Ev.
134.

was rejected on an information (under the Statute) for concealing naval stores, as being the informer, and being entitled to a moiety of the penalty; though in *Rex v. Cole*, *Peake's Cas.* 218, Lord KENYON held, a witness standing in a similar situation was not objectionable, because he had no absolute right to the penalty vested in him, as the Court were not bound to insist a pecuniary penalty. So in prosecutions on the Stat. 21 Geo. 3, c. 37, for exporting machinery, and on the Stat. 23 Geo. 2, c. 13, for seducing artificers to go out of the kingdom, the informers have been held to be competent witnesses. *Rex v. Teardale*, 3 Esp. Cas. 68. *Rex v. Johnson, Willes*, 425. And in cases of rewards for the apprehension of felons, &c. it was resolved by all the Judges, that the person apprehending, being entitled to the reward, did not disable him from being a witness. Vide *Leach's Cr. Cas.* 335, note. It should be observed, that most of the Statutes giving rewards, in such cases, were repealed by the Stat. 58 Geo. 3, c. 70.†

(e) Where persons have been joined as defendants, against whom there is no charge in the evidence, they may be admitted as witnesses. *State v. Shaw*, 1 Root's Rep. 134.

The same rule will apply in a civil case. *Barney v. Cutlar*, *ibid.* 489.

The guardian of a plaintiff infant in Chancery, may be examined for him, saving all just exceptions to be made at the hearing. *Trustees of Huntington v. Nicoll*, 3 Johns. Rep. 566.

If circumstances are proved, from which it is possible for the jury to presume facts amounting to guilt, a defendant in an indictment cannot be a witness. *Pennsylvania v. Leach et al.* *Addis. Rep.* 352.

A party in the same suit or indictment, cannot be a witness for his co-defendant until he has been acquitted or convicted; and whether the defendants plead jointly or severally, makes no difference. *The People v. Mill*, 10 Johns. Rep. 95.

So on an indictment for a riot against several, where the evidence as to one was insufficient for a conviction, yet the Court would not strike his name out of the indictment with a view to make him a witness for the defendant, without the assent of the Attorney General, though they might advise his acquittal. *The State v. Alexander et al.* 2 Rep. Const. Ct. S. Car. 171.—A. R. Ed.

† On an indictment where a witness is entitled to a part of the penalty, he is a competent witness, if he releases his interest. *Torre v. Summers*, 2 Nott & Mc Cord's Rep. 267.

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Parties in a
cause.

Raven et al.
v. Dunning
et al. Append.
3 Esp. Cas.
25, S. C.

one defendant, he cannot be a witness for the others; because the question, as to his liability, must wait the final event of the verdict, and the jury may, of their own knowledge, have further information of the fact, than what they collect from the witnesses in Court.(f) Thus where *A.* and *B.* being jointly sued in *assumpsit*, *B.* pleaded his discharge under a commission of bankruptcy, and on the trial proved his certificate; Lord *KARVON* held, that he was not entitled to an immediate acquittal, but that the plaintiff, having made a case against him, was entitled to have the whole case submitted to the jury at the same time, and consequently, he could not be examined as a witness for the other defendant.(g)

A prosecutor under the election law of 15th Feb. 1799, who is entitled to one moiety of the fine, may be admitted a witness on executing a release to the defendant. *Respublica v. Ray*, 3 *Yeates' Rep.* 65.

An informer who brings a *qui tam* action, is not a competent witness. *Bell v. Scott*, *Kirb. Rep.* 62. *Et vide Rapp v. Le Blanc*, 1 *Dall. Rep.* 63. *Commonwealth v. Frost*, 5 *Mass. Rep.* 57.

In a *qui tam* action to recover the excess of interest, above the legal rate, the borrower having returned the loan, and the agreement being cancelled, is competent to shew the usury. *Pettingal v. Brown*, 1 *Caines' Rep.* 168.

In an action *qui tam* to recover the penalty given by the Act concerning slaves, a member of the *New York Manumission Society*, is a competent witness, he being under no legal obligation to contribute to the expenses of the suit, and having no interest in the event of it. *Gilpin v. Vincent*, 9 *Johns. Rep.* 219.

In a *qui tam* action, it is no objection to a witness for the plaintiff, that the penalty when recovered, is to be appropriated to the support of the poor of the town in which he is an inhabitant, and liable to be taxed for the purpose. *Bloodgood v. Overseers of Jamaica*, 12 *Johns. Rep.* 285. *Corwein v. Hames*, 11 *Johns. Rep.* 76.

An informer, unless saved by the Statute, or from necessity of the case, is not a competent witness. *Ede Van Evour v. The State*, 2 *Nott & McCord's Rep.* 309, n.

The party from whom goods have been stolen, is a competent witness. *Commonwealth v. Moulton*, 9 *Mass. Rep.* 30.

A person entitled to a reward on a conviction, is a competent witness. *State v. Coulter*, 1 *Hayw. Rep.* 3. *Vide ante*, p. 222 n. c.—*AM. ED.*

(f) *Brown et al. v. Howard*, 14 *Johns. Rep.* 119. *Van Dusen et al. v. Van Slyck et ux.* 15 *Do.* 323.

A nominal defendant in ejectment, who afterwards assigns his interest to a co-defendant, and quits the possession, being released from all liability, may, with his own consent, be examined as a witness for the plaintiff. *Les. of Patterson et al. v. Bagerman et al.* 2 *Yeates' Rep.* 163. *S. P. Diermond v. Robinson et al.* *ibid.* 324.—*AM. ED.*

(g) A co-heir of lands descended from an intestate, may be called by the defendant as a witness to testify against the other co-heirs, who are plaintiffs, where he is not a party to the suit. *Nass v. Vanswearingen*, 7 *Serg. & R. Rep.* 192.

In an action against a certificated conveyancer, for negligence in managing the purchase of an annuity for the plaintiff, a joint purchaser is a competent witness for the plaintiff. *Rothery v. Howard*, 2 *Starkie's Rep.* 68.—*AM. ED.*

If the plaintiff, in his declaration, state that the defendant, together with *A. B.* committed a trespass, this will not deprive the defendant of the testimony of *A. B.* unless evidence be given of his having been concerned in the fact, and that process had issued against him, and endeavours used to serve him with it.^(h)

Ch. III. s. 3.
Parties in a
cause.

Lloyd v. Wil-
liams, Cas.
Temp. Hard.
123. Hill v.
Fleming, Ibid.
264.

Other cases, which at first sight seem to expose a witness to this objection on account of interest, are taken out of the rule by a counter interest in him, as where his interest in the event of the cause, supported by his evidence, is counteracted by an equal or greater interest, that it should be decided otherwise; for instance, if an indictment be preferred against a county for not repairing a bridge, and the only question be, whether it is in repair or not? men of the county are good witnesses; because it is equally desirable to every man that the bridge, for convenience of passage, should be repaired when it is necessary; as that the county should not be put to an unnecessary charge; so that they are perfectly indifferent, being equally concerned in both sides of the question.*⁽ⁱ⁾

Case of Peter-
boro' Bridge,
cited 1 Ventr.
351.
Gilb. Law Ev.
129.
Rex v. Inha-
bitants of
Wilts, 6 Mod.
307.

(h) In an action of trespass against several joint defendants, if there be no evidence against some of them, to implicate them in the trespass, they may be struck off the record, and admitted as witnesses for their co-defendants. *Brown et al. v. Howard*, 14 Johns. Rep. 119. *Van Deusen et al. v. Van Deusen*, 15 Do. 223. *Wakeley v. Hart et al.* 6 Binn. Rep. 316. *State v. Shaw*, 1 Root. Rep. 134. *Barney v. Cutlar et al.* *ibid.* 489.

Et vide *Church v. De Wolf*, 2 Root. Rep. 232. *Runney v. Church*, *ibid.* 420.

But in *Davis v. Living et al.* 1 Holt. N. P. Rep. it was held to be discretionary with the Judge at *Nisi Prius*, whether he will direct the acquittal of such defendants against whom there is no evidence, for the purpose of making them witnesses for the co-defendants.

If a writ against two be served only on one, and the suit proceed against the other, the latter is not excluded from being a witness, on the ground that he is a party to the suit. *Purvoiance v. Dryden*, 3 Serg. & R. Rep. 402. *Stockham v. Jones et al.* 10 Johns. Rep. 21.—A. N. Ed.

* By Stat 1 Anne, st. 1, c. 18, s. 13, inhabitants of the county, &c. are made good witnesses, where the question is, whether private persons, &c. are obliged to repair?

(i) The circumstance that the witness, in case of the recovery of one of the parties, would be liable to compensate the other for the costs of the present action, does not destroy the equality of interest. *Brit et al. v. Kreshaw*, 2 East. Rep. 458.

But in *Jones v. Brooke*, 4 Taunt. Rep. 464, a witness was held incompetent, who would have been liable at all events to pay to the losing party the contents of a bill of exchange, but in case of a recovery against the defendant, would have been answerable to him in damages for being sued, and for the costs of the action.

In *Brind v. Bacon*, 5 Do. 183, it was held that the guarantee of a bill discharged by bankruptcy of his liability on the bill, was not an incompetent witness in an action on the bill, by reason of his liability for costs.

If a witness, liable to the defendant in case the plaintiff recover, have a remedy

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Persons
indifferent.

Staples v.
Okins, K. B.
Sittings after
East. Tm.
1795, M. S.
Esp. 332.
S. C.
Goodacre v.
Bream,
Peak. N. P.
174.

Young v. Bair-
ner, 1 Esp.
Cas. 103.

On the same principle, the acceptor of a bill of exchange is a competent witness in an action against the drawer, to prove that he had no effects, and thereby prevent the necessity of notice to him; for though, by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he, at the same time, gives an action against himself at the suit of the drawer, in which the evidence he has given of the want of consideration will not avail him, but must be proved by another witness. But where a man was proved to be a partner with another, against whom an action was brought, it was holden that he was no witness to prove that the goods were sold to the other, as his servant, and on his sole credit, because the action which he gave against himself, was countervailed by a greater interest in getting rid of a moiety of the costs of the present action, to which he as partner, would be liable; but this interest may be removed, and his competency restored, by a release from his partner of any demand he may have upon him in consequence of the verdict.^(k)*

over against a third person, he is competent. *Ridley et al. v. Taylor*, 13 *East. Rep.* 175.

But it has been held, that a witness, who might have a remedy by action whether the plaintiff or defendant had a verdict, was nevertheless interested; because under the circumstances of the case, he would have a greater difficulty in the one case than the other, to enforce that remedy. *Burkland v. Tankard*, 5 *Term Rep.* 578. *Owen v. Mann*, 2 *Day's Rep.* 399.

One who is equally liable to an action by both parties, is a competent witness for either. *Nessley v. Swearingan*, *Addis. Rep.* 144. *Peterson v. Willing et al.* 3 *Dall. Rep.* 506. *Bailey et al. v. Ogden*, 3 *Johns. Rep.* 490. *Stump v. Roberts*, 1 *Cooke's Rep.* 350. *McLeod v. Johnston*, 4 *Johns. Rep.* 126. *Alexander v. Mahon*, 11 *Do.* 185. *Mitward v. Hallet*, 2 *Caines' Rep.* 77. *Baring v. Reeder*, 1 *Hen. & Munf. Rep.* 164. *Braxton's adm. v. Hilyard*, 2 *Munf. Rep.* 49. *Cushman v. Loker*, 2 *Mass. Rep.* 106. *Rice v. Austin*, 17 *Do.* 197. See vide *Emerton v. Andrews*, 4 *Do.* 653. *Williams's adm. v. Bradley*, 2 *Hayw. Rep.* 363. *Smyth v. McDow*, 1 *Rep. Const. Ct. S. Car.* 277.

One who has made an assignment of all his estate, in trust, to pay his debts, and to return the surplus, if any, to himself, is a competent witness in an action of trover brought by his assignees against one of his creditors who claims to hold goods as a security for the debt due from the assignor; because the interest which the witness has in the surplus is balanced by his interest in the application of the property in the hands of the defendant to the extinguishment of the debt due to him. *Jacoby et al. v. Laussat*, 6 *Serg. & R. Rep.* 300.—*Am. Ed.*

(k) In an action against two partners, one of them who has not been arrested, may be sworn, to prove the quantum of the demand on the part of the plaintiff. *Norman v. Norman et al.* 2 *Yeates' Rep.* 154.

In an action against A. B. and C. as secret partners, it was held, that the declara-

* In a subsequent case the Court determined, that where it appears the witness is interested both ways, they could not nicely weigh on which side his interest preponderated; and therefore an endorser of a promissory note, to whom the drawer

The evident policy of this rule of law, is to prevent those, who necessarily have a strong bias on their minds, from being put in a situation where their interest may induce them to depart from the truth; and, therefore, as we saw in a former instance, where the interest is strictly formal, arising from the situation in which they are placed, and they cannot be really benefited or injured by the event of the cause, it does not apply. Of this nature, is the case of a guardian in soccage, who may be examined on the behalf of his ward in an action brought by him: so a grantee, executor, or devisee, who is merely a trustee, and has no beneficial interest, may, in cases where he is not a party on the record, give evidence of the grant to him, or, in support of the will, by proving the sanity of the testator; and the circumstance of his having acted in the trust will not render him incompetent. But the case of a guardian on record stands on a very different foundation, for he is really interested

Ch. III s. 3.
Persons having legal title without beneficial interest.

(1) *Gilb. Law Ev.* 123.

(2) *Gross v. Tracy*, 1 P. Will. 290.
Goodtitle dem. *Forbes v. Welford*, Dougl. 139.

(3) *Lowe v. Jolliffe*, 1 Black, 365.
See also *Betson v. Bromley*, 12 East, 250, and post. 155.

(4) *Hopkins v. Neale*, 2 Stra. 1026.

tions and acts of A. though evidence to shew that he considered himself a secret partner with B. and C. were not admissible, directly to implicate, or charge B. as a partner. *Whitney v. Ferris et al.* 10 Johns. Rep. 66.

An admission by one partner, after the dissolution of the partnership, of a balance due from the firm, does not bind the firm; but entries made by one partner during the partnership, in a book of accounts, are admissible evidence against both. *Walden et al. v. Sherburne et al.* 15 Johns Rep. 409.—AM. ED.

had given money to take it up, was held to be a competent witness for the defendant to prove it paid, being either liable to the plaintiff on the note, or to the defendant for the money had and received. His being also liable, in the latter case, to the costs incurred by the action, was considered as making no difference. *Birt v. Ker-shaw*, 2 East, 458. So where one partner drew a bill in the partnership firm to the order of the firm, and after it was accepted by the defendant, passed it to the plaintiff, who was a separate creditor of such partner for his separate debt; it was held, that in an action against the acceptor, he might call either partner to disprove the authority of the debtor partner to give the joint security, and that the bankruptcy of the debtor partner in the meantime, did not vary the question of competency. *Ridley v. Taylor*, 13 East, 175. And again in *Brind v. Bacon*, 5 Taunt, 183, it was held, that a person who had guaranteed the payment of a bill having become bankrupt, whereby he was discharged from the bill, was not incompetent by reason of his liability to costs in an action on the bill. But where an action was brought against the acceptor of an accommodation bill, the Court of Common Pleas held, that the drawer was not a witness to prove that the holder took the bill on an usurious consideration, and this on account of the superior interest he had in the case of the acceptor, for the holder, it was said, could recover against him only the contents of the bill, whereas the acceptor was entitled to recover against him both the amount of the bill and all damages he might sustain, including the costs of the action against himself. *Jones v. Brooke*, 4 Taunt. 464. For other instances, where a witness is admitted on account of his indifference, vide Digest at the end of this section, (B) 5.

Ch. III. s. 3. in the event of the suit, being liable to the costs, in case the verdict is against the infant whom he protects. (1)

Persons thinking themselves interested where they are not so.

Where a right is claimed by a witness, which is supposed to interest him in the event of a cause, it should be considered be-

(1) An executor, plaintiff, on a feigned issue to try the validity of a will, is not a competent witness, being liable for costs. *Vansant v. Boileau*, 1 Binn. Rep. 444.

An executor, plaintiff, who had no interest in the residue of the estate, was ruled not to be competent, although the costs were offered to be lodged in the Court. *Cochran v. Cochran et al.* cited 1 Yeates' Rep. 134.

So where issue is joined on the plea of *plene administravit*, an administrator cannot become a witness by releasing his interest, and paying costs, because the issue may be found against him, and he be rendered personally liable for the debt. *Heckerri et al. v. Haine*, 6 Binn. Rep. 16.

An administrator, plaintiff, who had been clerk to the intestate, was held to be a good witness to prove a book of original entries of the intestate, and that he himself made certain original entries in the book, when it did not appear that there was any other person living that could make the proof. *Ash et al. v. Patton*, 3 Serg. & R. Rep. 300.

The practice of the English Chancery, to admit a trustee as a witness, has been uniformly adopted in the Courts of Law of Pennsylvania. *Drum v. Lee of Simpson*, 6 Binn. Rep. 478.

A trustee is competent to give evidence of misrepresentations in consequence of which he accepted the trust. *ibid.*

An executor, defendant, may prove the state of papers when he found them, and where they were discovered. *Lenox v. De Haas et al.* 2 Yeates' Rep. 37. *Standley et al. v. Weaver et al.* *ibid.* 256.

But an executor, defendant, cannot prove a fact material to the issue. *Dehuff v. Turbitt et al.* 3 Yeates' Rep. 157.

An attorney in a suit, may be examined to prove the state of an instrument when put into his hands. *Baker et al. v. Arnold*, 1 Caines' Rep. 258. Et vide *Reid v. Colcock*, 1 Nott & McCord's Rep. 592.

Where a *chose of action* is assigned before suit brought, the nominal plaintiff where the transfer is *bona fide*, and he takes no part in carrying on the suit, and is to gain nothing by its termination, was admitted as a competent witness, though he admitted that the assignment was made with an intention to open the way for his testimony. *Wistar v. Walker*, 2 Browne's Rep. 166.

To remove an objection to the plaintiff's evidence on the ground of liability to costs, it is necessary that the whole costs, which have accrued, or may accrue, should be paid, and that he should stipulate that in no event should those costs be refunded. *Ash et al. v. Patton* 3 Serg. & R. Rep. 300.

A plaintiff, who after the commencement of the action has made a voluntary assignment of all his property to trustees, for the benefit of his creditors, and who has released to his assignees all money that may be recovered in the suit, is a competent witness, provided all the costs are paid before he is sworn. *Steele v. Phoenix Ins. Co.* 3 Binn. Rep. 306. *Browne v. Weir*, 5 Serg. & R. Rep. 401. WASHINGTON J. in the case of *Willing et al. v. Consequa*, 1 Peters' Rep. 308, says, "I yield my entire consent to the principles laid down in *Steele v. Phoenix Ins. Co.*"

A contrary decision was made in *Virginia*, by a majority of the Court, in *Cogbill v. Cogbill et al.* 2 Hen. & Munf. Rep. 467.

An administrator, who is one of the plaintiffs in the suit, may be examined as a witness for the plaintiffs, after he has executed a release to the heirs of his claim for commissions, and has paid to the prothonotary a sum sufficient to pay all the costs

fore he is rejected on that account, whether it be a strict legal right, or one existing merely in his own imagination; for if the latter only be the case, it does not seem to fall within the rule; (1)(m) thus it has been said, that a mere tenant at will may prove livery of seisin in his lessor, for his interest being so precarious that he cannot maintain an action for the possession, he is considered by the law as no more than the servant or bailiff

Ch. III. s. 3.
Persons thinking themselves, &c.

(1) Hale sup. Lit. 6. Gibb. Law Ev. 124.

which have accrued or may accrue, to be applied to such payment, let the verdict be as it may, unless it appear that he is in danger of being involved in a *devastavit*. *Patton's adms. v. Ash*, 7 Serg. & R. Rep. 116. Et vide *Richter v. Selin*, 8 Do. 425.

A stockholder in a bank on being offered as a witness in favour of the bank, executed a transfer of his stock, to his daughter, then at a distance, and without her knowledge, and delivered to the cashier for her use, it was held, that he thereby became a competent witness. *Smith v. Bank of Washington*, 5 Serg. & R. Rep. 318.

A liability for the costs of the suit will render a witness incompetent, though generally speaking a mere naked trustee, without any interest, is competent. *Main v. Newson*, 1 Anth. N.P. Cas. 7.—AM. Ed.

(m) In *Massachusetts*, it has been ruled, that where a witness would testify under an impression that he is interested in the event of the suit, though in fact he has no legal interest in it, yet he is disqualified. *Plumb v. Whiting*, 4 Mass. Rep. 518.

In *Vermont*, a person was offered as a witness, who declared he considered himself interested when he is not, on being informed by the Court he is not, he shall be admitted, and the bias of his mind shall go to his credibility. *State v. Clark*, 2 Tyl. Rep. 278.

A person who thinks himself interested, when in fact he is not, is nevertheless a competent witness. *Long v. Bailie*, 4 Serg. & R. Rep. 226. *Fernald v. Carlin*, 3 Do. 130.

Where a person offered as a witness at the trial of an information filed against certain goods, being examined on his *voire dire*, said that he assisted in making a seizure of the goods, and in case they were condemned, but not otherwise, he expected some compensation from the informer, though he had received no positive promise, his testimony was held to be inadmissible. *McVeagh v. Goods*, 1 Dall. Rep. 62, cited and approved in the case of *Innis v. Millar*, 2 Do. 50.

So a creditor, though not excluded from giving testimony as such, yet if he acknowledge that he expects to gain or lose by the cause, he is thereby excluded as a witness. *Innis v. Millar*, 2 Dall. Rep. 50.

A witness who has an order to be paid out of the sum to be recovered in the suit drawn upon the agent, who is to receive such sum, is not a competent witness, though the order be not accepted. *Peyton v. Ballett*, 1 Caines' Rep. 363.

Where the witness declares on his *voire dire*, that he is interested in favour of the party calling him, and that his interest is so circumstanced that he cannot be released, the witness ought not to be sworn, though in strictness he is not interested, but if his supposed interest is against the party calling him, he ought to be admitted. *The Trustees of Lansingburgh v. Willard*, 8 Johns. Rep. 423.

In *Virginia*, it has been held, that a mere hope of benefit will not disqualify, but an absolute promise in the event of the suit, will render him incompetent. *Baring v. Reeder*, 1 Hen. & Munf. Rep. 166.

In *North Carolina*, it has been ruled, that a witness conceiving himself interested,

Ch. III. s. 3. of the freeholder. This instance can hardly now be considered as an authority, further than toward the establishment of the general principle, that the witness should have a real and not a mere ideal interest, before he is rejected; for that which the law

(1) *Doe dem. Forster v. Williams, Comp. 621.* formerly considered as a tenancy at will, is now, in most cases, converted into a tenancy from year to year, which being a permanent interest, is noticed by the law: and, therefore, such a

(2) *Doe dem. Jones v. Wylde, 5 Taunt. 183.* tenant cannot be examined in support of his landlord's possession; (1) or to defeat the action by shewing that he, and not the defendant in the cause, is the person in possession. (2) And it

(3) *Per Tisdal, 1 Mod. 21.* was long since said, (3) that if a landlord had promised another person a lease of his land when recovered, such person could not be a witness; for this, though not an immediate vested interest, was nevertheless a right which might be enforced in a Court of Law in case a verdict should be procured on his evidence.

In these cases, the witness himself claimed a right; but in a case where the witness thought himself under an honorary engagement to make good a loss if it were not repaired by the event of the cause, though he knew he was not legally bound to do so, it was held sufficient to reject his testimony. (4) Lord

(4) *Fotheringham, v. Greenwood, 1 Stra. 129.* C. J. MANSFIELD, however, in a late case which came before him, determined that this honourable feeling of the witness did not render him incompetent. (5) (n)

Another thing to be observed in the application of this rule of law is, that the interest must exist at the time when the fact which the witness is to prove happened, or be thrown upon him afterwards by operation of law, or the act of the party who requires his testimony; for if after the event the witness become interested by his own act, without the interference or consent of the party by whom he is called, such subsequent interest will

Of interest acquired since the fact to be proved.

Vide Bent v. Baker, 3 T. Rep. 27.

when in fact he is not, will not render him incompetent. *Harrison v. Harrison, 2 Hayw. Rep. 355.* Et vide *Rogers v. Briley, 1 Do. 256.*—AM. ED.

(n) A witness interested in the event of the suit, on the ground of his being liable over to the defendant, having been released by the defendant, was asked if he did not expect to pay the judgment and costs, provided a recovery was had against the defendant, to which he replied, "I certainly do." Held, that such witness was incompetent to testify for the defendant. *Skillenger v. Bolt, 1 Con. Rep. 147.*

Where the creditor of the plaintiff was offered as a witness, and the plaintiff had no visible means of payment, except by a recovery in that suit, this will not be sufficient to render him incompetent. *Benedict v. Brownson, Kirb. Rep. 70.*

An honorary engagement, which cannot be enforced at law, will not render a witness incompetent. *Long v. Bailie, & Serg, & R. Rep. 227.* *S. P. Gilpin qui tam, &c. v. Vincent, 9 Johns. Rep. 219.*—AM. ED.

not render him incompetent.^(o) This exception to the general rule of law, is founded on true principles of justice, for otherwise it would always be in the power of the witness, and oftentimes in that of the adverse party himself, to deprive the person wanting his testimony of the benefit of it. Thus, though a person who knows the circumstances of a cause, lay a wager as to the event of it,⁽¹⁾ or a prosecutor lay a wager that he shall convict a defendant,⁽²⁾ neither the individual in the one case, nor the public in the other, will be deprived of the right which they previously had to the testimony of the person so interesting himself.

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Of interest
acquired, &c.

(1) Barlow v. Vowell, Skin. 586.

(2) Rex v. Fox, 1 Stra. 652.

Not only must the interest exist at the time of the transaction, but it must continue to the time of the trial; and therefore, when a witness is interested by being answerable to one of the parties; or will have a demand on that party in case the cause be unsuccessful, a release from the party to the witness, or from the witness to the party, as the case may require, by taking away his interest, restores his competency;^(p) and, in these

Of interest
removed at
the time of
the trial.

(o) A witness, who after obtaining his knowledge on the subject, voluntarily becomes interested, will be compelled to give testimony. *Tatem's exrs. v. Lofton et al.* 1 Cooke's Rep. 115. *Simons v. Paine*, 2 Root's Rep. 406.

If a witness be competent to attest a will at the time of the attestation, and afterwards becomes incompetent by means of an interest accruing since, he cannot be a witness at the trial of the issue of *deceitum vel non*. *Hampton v. Garland*, 2 Hayw. Rep. 147. Vide post, Ch. XIV. s. 2.—AM. ED.

(p) A release to a person otherwise interested, will restore his competency, though made at the bar during the trial. *Les. of Lilly v. Kintzmill*, 1 Yeates' Rep. 28. Et vide *Willing et al. v. Consequa*, 1 Peters' Rep. 307. *Humes v. Day*, 1 Root's Rep. 466. *Carroll v. M'Whorter*, 2 Bay's Rep. 463. *Jewett v. Worthington*, 1 Root's Rep. 226. *Reading v. Metcalf*, *Hardin's Rep.* 535.

A release to a *baron and feme*, the husband being absent, will make the *feme* a good witness. *Les. of Bioren v. Keep*, 1 Yeates' Rep. 576.

A witness, once interested, will be presumed to remain so until the contrary be proved by a release. *Miffin v. Bingham*, 1 Dall. Rep. 876.

A *guardian*, who had given a receipt, was admitted as a witness upon being released. *Pleasants v. Pemberton*, 2 Do. 196.

A slave, after he has obtained his freedom, is a competent witness to prove a fact which may have happened, while he was a slave. *Gurnie v. Dessies*, 1 Johns. Rep. 508.

An agent to whom there is some objection on the ground of interest, is rendered unobjectionable by a release. *Burlingham v. Dyer*, 2 Johns. Rep. 189.

A release executed to a witness, after his examination, does not make him competent. *Hepf v. Burling*, 1 Caines' Rep. 14. *Doty v. Wilson*, 14 Johns. Rep. 378.

The endorser is a competent witness to prove the hand writing of the drawer of a note, if released by the endorsee. *Barnes v. Ball*, 1 Mass. Rep. 73.

If one, as agent for another, purchase a bill of exchange, and endorses it to his principal, the latter may call the agent as a witness, if he first prove that he was merely agent, or give him a release. *Murray v. Carrot*, 3 Call's Rep. 373.

H h

Ch. III. s. 3.
Of interest
removed, &c.

Goodtitle
dem. Fowler
v. Welford,
Doug. 139.
Bent v. Ba-
ker, ub. sup.

cases, if the party who wishes to call the witness tender a release to him, and he refuse to accept it; or the witness having a claim tender a release on his part, which is refused, he may be examined as a witness; for neither the witness himself, nor the party in the cause, can exclude his testimony, by an objection on account of his interest, when that interest has in truth been removed.*

In an action against the owner of a ship, the master is not a competent witness without a release. *Gardner v. Smallwood*, 2 *Hayw. Rep.* 340.

A partner with the defendant, in the transaction for which he is sued, cannot be qualified to be a witness, by a release from the defendant, because he is liable to the plaintiff. *Tomkins v. Bars*, 2 *Root's Rep.* 498.

Where one effects an insurance on account of a third person as his agent, but without any authority from him, such third person in an action against the insurer for a return of premium, on being released by the plaintiff from all claim for the premium, is a competent witness. *Steinback v. Rhinelanders*, 3 *Johns. Cas.* 269.

A grantor in a deed, is rendered competent to prove, as well as disprove a fraud in a deed by a release. *Jackson ex. d. Mapes v. Frost et al.* 6 *Johns. Rep.* 135.

In *Virginia*, a grantor with warranty, is inadmissible to support the title of his grantee. *Moon v. Campbell*, 1 *Munf. Rep.* 600.

At the hearing of a cause in Chancery, and after the argument had been finished in part, an objection was made to the competency of a witness, whose deposition taken before the examiner had been read, the Court allowed the plaintiff to prove a release from the witness of all his interest, by the examination of a witness *viva voce*, without any previous order or notice for that purpose. *Barrow v. Rhinelanders*, 1 *Johns. Ch. Rep.* 559. Et vide *Jewitt v. Worthington*, 1 *Root's Rep.* 226.

Where a witness has gone through his testimony, and it is then discovered that he is interested, he will be competent if he release his interest; and he may be re-examined. *City Council v. Haywood*, 2 *Nott & Mc Cord's Rep.* 308.—AM. EN.

* In the case of *Goodtitle dem. Fowler v. Welford*, a person who was devisee of a reversion in copyhold premises was called to substantiate the will, by proving the sanity of the testator, he had surrendered his reversion to the use of the heir at law, but the heir had refused to accept it, yet the Court held him to be a competent witness; and Mr. Justice Ashurst said, "every objection of interest proceeds on the presumption that it may bias the mind of the witness; but that presumption is taken away by proof of his having done all in his power to get rid of his interest."

But in *Holdfast dem. Apsley v. Dowling*, 2 *Str.* 1253, where an annuity of 20*l.* per annum was given by will to *Elizabeth*, the wife of *John Hales*, for life, to her separate use; and also a legacy of 10*l.* each to *John Hales* and his wife, to which will *John Hales* was a subscribing witness; the Court of King's Bench held *Hales* could not be a witness, though the devisee had tendered the two legacies of 10*l.* each. The Chief Justice, in delivering the resolution of the Court, said, "If the tender would be equal to payment of the two money legacies, as it is not; yet the annuity charged upon the estate devolved, would still subsist: and further he observed, that the true time for ascertaining his *credibility* was the time of attestation, and if then interested he could not afterwards be a witness."

Lord Mansfield, in delivering the opinion of the Court, in *Windham v. Chetwynd*, 1 *Burr.* 417, &c. commented much at length on the word *credible*, as applied to witnesses in the Statute of Frauds, on which the decision of the Court, in the last case, in some measure proceeded; and observed, "that the word was never used as synonymous to *competent*; but when applied, it presupposes the evidence

I shall conclude this section by observing, that a man who is interested in the event of a suit, is objectionable only when he comes to prove a fact consistent with his interest; for if the evidence he is to give be contrary to his interest, he is the best possible witness that can be called, and no objection can be made to him by the party in the cause. (q) In this case, however, he might formerly have objected to be examined, because his evi-

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Against his
own interest.

Oxendon v.
Peurice, Salk.
691.

given. After the competence of a witness is allowed, the consideration of his credibility arises, and not before; and the only consideration, in determining his competency, must be, whether he was competent at the time of his examination? His Lordship said, "that the decision of the Court in that case went rather upon the particular circumstances of it, than upon the general proposition, and that as to the annuity there was no release. There could be no payment or tender without the interposition of a Court of Justice, because the value depended upon uncertain estimation, but no attempt had been there made towards paying or tendering the value of the annuity." It is impossible to convey, by any abridgment of the case of *Windham v. Chetwynd*, the substance even of the very elaborate and elegant judgment pronounced by Lord MAXWELL on that occasion; and the question here made having been settled by Legislative interference, in consequence of the decision in *Anstey v. Dowling*, it becomes unnecessary to state the case at length.

For by Stat. 25 Geo. 2, c. 6, it is enacted,

1. That any beneficial devise, legacy, estate, interest, gift or appointment, made to any person being a witness, after 24th June, 1754, to any will or codicil, shall be void, and such person shall be admitted as a witness.

2. That any creditor attesting any will or codicil, made or to be made, by which his debt is charged upon land, shall be admitted as a witness to the execution of such will or codicil, notwithstanding such charge.

3. That any person who had attested, or should attest any will or codicil, to whom any legacy or bequest was or should be given, having been paid or released, or upon tender made having refused to accept such legacy or bequest, should be admitted as a witness to the execution of such will or codicil.

4. That any legatee, having attested, or who should attest a will or codicil, and who should have died in the life-time of the testator, or before he had received or released his legacy, should be deemed a legal witness to such will or codicil.

After which there is a proviso, that the credit of every such witness, in any of the cases before mentioned, shall be subject to the consideration of the Court and jury before whom he shall be examined, or the Court of Equity in which his testimony shall be made use of, in like manner as the credit of witnesses in all other cases ought to be considered of and determined.

In *Bettison v. Bromley*, 12 East, 250, one of the subscribing witnesses to the will was the wife of one of the executors who had proved the will and acted under it. An issue was directed to try the sanity of the testator, and a case being saved, it appeared that the witness's husband took no beneficial interest under the will; on which the Court held, that she was a credible witness within the Statute of Frauds, and a competent witness on the trial. The above Stat. of 25 Geo. 2, does not appear to have been adverted to in the argument.

(q) A witness is competent when called on to testify by a party against whom he is interested. *Jackson ex d. Young et al. v. Vredenburg*, 1 Johns. Rep. 159.

The declarations of the tenant or party in possession are never received in evidence in support of his title; *aliter* if against the interest of the person making such declarations. *Waring v. Warren*, 1 Johns. Rep. 340. *Murray v. Wilson*,

Ch III. s. 8. dence might subject him to future inconvenience; but of this
Against his hereafter.* (r)
own interest.

1 Binn. Rep. 531. *Wells v. Tucker*, 3 Do. 366. *Braxton's adm. v. Hilyard*, 2 Munf. Rep. 49. *Storrs v. Wetmore*, Kirb. Rep. 903. *Cobb v. Baldwin*, 1 Root's Rep. 534. *Webster v. Lee*, 5 Mass. Rep. 334. *Barker v. Prentiss*, 6 Do. 430. *Appleton v. Boyd*, 7 Do. 131. *Smyth v. M^r Dew*, 1 Rep. Const. Ct. S. Car. 277. *Barclay's assignees v. Carson*, 2 Hayw. Rep. 243.

So a witness that is incompetent, if called by the defendants, will be competent, when called by the plaintiff. *Jacobson v. Fountain*, 2 Johns. Rep. 170.

The grantee of land is competent to prove the deed fraudulent. *Hill v. Payson* 3 Mass. Rep. 559. Vide *Fowler v. Norton*, 2 Root's Rep. 231.—AM. ED.

* Vide post, Ch. III. s. 5.—AM. ED.

(r) A person may be compelled to testify, though his evidence would operate against his interest in another action. *Baird v. Cochran et al.* 4 Sarg. & R. Rep. 397. *Nuss v. Fanswearingen*, *ibid.* 192. Et vide *Connor v. Brady*, *Anth. N. P. Cas.* 100, n. a.

Sed contra, *Cook v. Corn*, 1 Overton's Rep. 340, *Storrs v. Wetmore*, Kirb. Rep. 903. *Starr v. Tracy et al.* 2 Root's Rep. 528. *Benjamin et al. v. Hathaway*, 3 Com. Rep. 528. *Navigators Company v. City of New Orleans*, *Martin's Rep.* 23.

But a witness is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced. *The People v. Herrick*, 13 Johns. Rep. 82.

Nor where it may involve him in shame or reproach. *ibid.*

Nor any question that will impeach his conduct as a public officer. *Jackson ex. d. Wyckoff v. Humphrey*, 1 Johns. Rep. 498.

In *Burr's* trial, it was decided to be the province of the Court to determine whether the answer to the question proposed to a witness, will furnish evidence against him. 1 *Burr's Trial*, 245.

In *New York*, under the Stat. 3d March, 1787, which in this respect is similar to the Act in the text, it has been decided that if either husband or wife be a witness to a will, containing a devise or legacy to either, the devise is void by this Statute, and the devisee or legatee becomes a competent witness to the will. *Jackson ex. d. Corder et al. v. Woods*, 1 Johns. Cas. 163.

Where a husband was a witness to a will, containing a devise to his wife, such devise is void, and the husband is a competent witness. *Jackson ex. d. Beach et al. v. Durland*, 2 Do. 314.

A devise to a witness to a will, under the Statute of *New York*, is absolutely void. *Jackson ex. d. Denniston et al. v. Denniston*, 4 Johns. Rep. 311.

As to the competency of witnesses to a will at common law, vide post, Ch. XIV. s. 2.—AM. ED.

DIGEST OF CASES,

AS TO THE INTEREST OF WITNESSES.

(A.) *In what cases, corporators and others are witnesses on public questions.*

THE general rule as to this is, I believe, correctly stated in the preceding section; and it was well observed by SCROOGE C. J. 2 *Lev.* 231, that it cannot be a general rule that members of corporations shall be admitted or refused to be witnesses in actions for or against the corporation, but every case shall stand upon its own circumstances; to wit, whether their interest be so valuable, as it can be presumed it may occasion partiality in them, or not; with this preliminary observation, I shall refer to a few of the ancient cases, and most of the more modern ones.^(a)

Ch. III. s. 3.
Corporators
and others on
public ques-
tions.

1. In the case of the *Corporation of London* for water-bailage, 1 *Ventr.* 351, an action being brought by the Mayor and Commonalty of *London*, for tonnage on wine imported by the defendant; freemen of *London* were offered as witnesses for the plaintiffs; and on objection being taken to them by the defendant's counsel, because they were parties (the Commonalty comprehending all the freemen,) and likewise interested, SCROOGE, DOLMAN, and RAYMOND, were of opinion that they were witnesses; but JONES J. was of a contrary opinion; and the plaintiff's counsel, having other witnesses, did not examine them. But in another case, where the question as to the right of the city to toll on coals came in question, it appearing that the Mayor and Sheriffs had the toll for the corporation at large, and that no individual citizen was benefited by it, the freemen were held good witnesses. *Rex v. Mayor, &c. of London*, 2 *Lev.* 231. And so in the case of *King v. Carpenter*, 2 *Show*, 47, all the Judges, except JONES, held them good witnesses in such cases.

2. Upon a trial at bar, of an issue directed out of Chancery, whether all the manor of *S. H.* was within the county of *Stafford*? Exception was taken to some of the witnesses, who were called to prove the manor-house within the county of *Salop*, because they were of that county themselves; but it was ruled that any person of the county, if he was not within the hundred where the manor was, might be a wit-

(a) The inhabitants of an incorporated society, to whom property is devised for the support of a school, are competent witnesses to attest the will. *Cornwall v. Isham*, 1 *Day's Rep.* 35.

The confessions of individual members of a corporation aggregate, a party to the suit, which were not made in the exercise of any corporate duty, cannot be received in evidence. *Hartford Bank v. Hart*, 3 *Day's Rep.* 492.

The acts of the directors of a turnpike company, not authorised by a vote of the corporation, are inadmissible as evidence. *Waterbury v. Clark*, 4 *Day's Rep.* 198.

In an action of trespass brought against certain inhabitants of *Staten Island*, for building fishing huts, &c. on land claimed and possessed by the plaintiff, an inhabitant of *Staten Island*, is not a competent witness for the defendants, to prove a common right in all the inhabitants to the fishery in question. *Jacobsen v. Fountain et al.* 2 *Johns. Rep.* 170.—AM. ED.

Ch. III. s. 3.
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tions.

ness: for as to the county taxes, every hundred pays its proportion; but as to hundreds, there are particular charges. But it being afterwards proved that there was a general tax in each county, for maintenance of the suit, no one who was charged thereto, was permitted to be a witness. *The County of Salop v. The County of Stafford*, 1 Sid. 192. By Stat. 8 Geo. 2, c. 16, s. 15, hundredors are made witnesses for the hundred in actions against them; on the Statute of *hue and cry*, and by Stat. 1 Anne, st. 1, c. 18, s. 13, inhabitants of any county, division, &c. are made good witnesses in indictments for not repairing *bridges*, where the question is, whether the county, &c. or a private person is liable to repair? Surveyors of the highways in all cases relative to the execution of the Highway Act, and inhabitants on trials for offences committed against it, are made witnesses by the express provisions of the Statute. Vide Stat. 13 Geo. 3, c. 78, s. 69, 77. The like provision is made in the case of inhabitants as to offences committed against the general Turnpike Act. Vide 13 Geo. 3, c. 84, s. 74. By Stat. 3 & 4 W. & M. c. 11, in all actions to be brought in the Courts of *Westminster*, or at the assizes, for money mis-spent by churchwardens, the evidence of parishioners, other than such as receive alms, shall be taken and admitted; and by Stat. 27 Geo. 3, c. 29, parishioners are made competent witnesses in all cases where penalties not exceeding 20*l.* are given to the parish; and lastly, by Stat. 54 Geo. 3, c. 170, s. 9, it is enacted, that no inhabitant or person rated or liable to any rates, or cesses of any district, parish, township or hamlet, or wholly or in part maintained or supported thereby, or holding or exercising any office thereof or therein, shall before any Court or person or persons whatsoever, be deemed or taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, in any manner relating to such rates or cesses, or to the boundary between such district, &c. and any adjoining district, &c. or to any order of removal to or from such district, &c. or concerning any bastards chargeable or likely to become chargeable, &c. to such district, &c. or to the recovery of any sum or sums of money for the charges and maintenance of such bastards, or to the election or appointment of any officer or officers of any such district, &c. any law, &c. to the contrary in any wise notwithstanding.

3. Before the making of the above Statutes, it was held, that at common law, where a person is *not rated*, though rateable, he is a witness. *Case before BURLAND J at Salisbury*, cited 4 *T. Rep.* 20.(*t*)

4. On an appeal against a poor rate, because certain persons were not rated; that a parishioner, who was liable to be rated, but not in fact rated, was a competent witness to prove the rateability of the persons omitted. *Rex v. Prosser*, 4 *T. Rep.* 17.

5. So that an inhabitant, who was not rated, was a competent witness on an appeal between his own parish and another. *Rex v. Little Lumley*, 6 *T. Rep.* 157; though left out of the rate for the mere purpose of making him a witness. *Rex v. Inhabitants of Kirdford*, 2 *East*, 559. But where his son was rated for the property held by him he was deemed incompetent. *Rex v. Killerby*, 10 *East*, 292.

6. So such person was considered a good witness to extend the boundary of his parish, on a question as to the line of boundary between two adjoining parishes. *Deacon v. Cooke, Tunton Sp. Assiz.* 1789, cited *Ibid.* 562. Since the passing of the last Statute it has been holden, that on a question whether certain lands belonged to an individual or to certain trustees in aid of the poor rates, inhabitants were admissible witnesses. *Meredith v. Gilpin*, 6 *Price*, 246.

7. In trespass, the plaintiff claimed as lessee of the corporation of *Kington*, who as lords of the manor had approved the land in question, and it was ruled that a free-man could not be a witness to prove sufficiency of common left, because the rent must be reserved to the use of the corporation. *Burton v. Hinde*, 5 *T. Rep.* 174.

8. The question being, whether the plaintiff was entitled to be elected common-

(*t*) *S. P. Falls v. Belknap*, 1 *Johns. Rep.* 486.—*AM. Ed.*

council-man of *Appleby*? the defendant attempted to disqualify him, by setting up two qualifications which he had not, viz. a burgage tenure, and being an inhabitant; Corporators and others on tenure. It was objected that he was no witness to narrow the right, and confine it to burgage tenants and inhabitants, having one of these qualifications himself, and therefore so far interested, as he was nearer the right he set up than other persons. But the Court said, there was a necessity of allowing such people in a question of this nature, since they must best know the right; besides he was in effect a witness against himself, by saying, though I am an inhabitant, yet I have no right to be chosen, because I have not a burgage tenure. *Stevenson v. Nevinsan*, 1 *Stra.* 583; 2 *Lord Raym* 1353, *S. C.*

9. Upon information, in nature of *quo warranto*, the question on which the defendant's title turned was, whether the former Mayor had a right to name two elisors to return a jury, if the town clerk, who might nominate one, was absent or refused? The second elisor nominated by the Mayor was called as a witness, and it was objected to his competency, that he having acted under such a nomination was liable to an information, and therefore could not be examined. The Judge allowed the objection; but, on motion for new trial, the Court thought it went only to his credit, and granted a new trial. *Rex v. Robins*, 2 *Stra.* 1069.

10. But in the case of the *Company of Carpenters, &c. v. Hayward*, Dougl. 360, where an action was brought by a corporation on a custom, a stranger who had acted in defiance of the custom was held to be an incompetent witness.

11. On the trial of an issue taken on the return to a *mandamus* to admit a man to his freedom, as the eldest son of a freeman, the father was held to be a good witness to prove the custom for sons of freeman to become free. *Rex v. Mayor and Burgesses of Oakhampton*, 1 *Wils.* 332.

12. *Rex v. Philips and Archer*, at Camb. per LEX C. J. *Bul. N. P.* 289, the question being, whether the defendants had a right to be freemen, though it appeared there were commons belonging to the freemen, yet an alderman was permitted to prove them not freemen, it appearing that none but aldermen were privy to the transactions, in making persons free.

13. In some cases, freemen interested as such, have been deemed competent when disfranchised, as where the company of saddler's brought debt on Statute 1 *Jac. c.* 22, against a man, to recover a forfeiture, for making saddles insufficiently, three of the company being disfranchised, and declaring on the *voir dire*, that they had no assurance of being restored, were admitted as witnesses. *Saddlers Company v. Jones*, 6 *Mod.* 165. But where a freeman was called, and, on an objection to his testimony, the corporation produced a judgment in the Mayor's Court, whereupon a *scire facias* being awarded, and two *nihilis* returned, he was adjudged to be disfranchised; the man saying that he was not summoned, and knew nothing of the disfranchisement, HOLT C. J. would not permit him to be examined. *Brown v. Corporation of London*, 11 *Mod.* 335.

14. On a prescription of a right of common, as appurtenant to the house of *A.*, *B.* who has a similar house, is a good witness; but if it be claimed by custom, as appurtenant to all houses similar to that of *A.*, *B.* would not be a witness, because the record would, in this case, be evidence of his right. *Bul. N. P.* 283. Vide *John v. Fothergill*, *Append.* But where an action on the case was brought by a commoner claiming a prescriptive right against an owner of adjoining land for not repairing his fences, and the question was, whether he was liable to such repairs? It was held that other commoners could not be witnesses, because by establishing such a liability they increased the value of the common. *Anscomb v. Shere*, 1 *Tawnt.* 261. So where an issue was directed to try whether the inhabitants of *A.* were immemorially bound to repair a chapel, the owner of the inheritance is not a competent witness, although he has leased his estate and is not rated, for he has an interest in discharging the inheritance from a permanent burthen. *Rhodes v. Ainsworth*, 1 *B. & A.* 87. —Vide ante, p. 220.—*AN. ED.*

(B.) *Servants and Agents.*

1. A BANKER's clerk, having paid more than was due on a bill, was held a good witness in an action brought by the banker to recover back the surplus; and this from necessity. *Martin v. Horrel*, 2 *Str.* 647. So where a person generally intrusted his son to receive money for him, who did so, and delivered it to the defendant; in an action of trover to recover it, the son was held a good witness. *Anonymous*, *Salk.* 239.

2. The plaintiff's servant having given money of his master's to the defendant for illegal insurances in the lottery, was admitted a witness for his master, *on being released by him*. Note, this was not the case of an ordinary transaction in business, and therefore the release appears to have been necessary to make him a witness. *Clarke v. Shee*, *Cowp.* 199.

3. *A.* sells goods to *B.* and afterwards *C.* desires *D.* to pay *A.* and promises to repay him. *D.* pays *A.* and afterwards *B.* allows the money to *D.* in account. In an action against *C.*, *B.* was called to prove the account, (it amounting to payment,) and it was objected that the contract being originally only between *A.* and *B.*, *B.* was still liable to *A.* and was therefore swearing to discharge himself; but the Chief Justice said, he would allow him to be a witness to prove the payment as a servant to *C.* *Brownson v. Avery*, 1 *Str.* 506.

4. A factor, who was to have a poundage, *according to the amount of the sale* was held a good witness to prove the contract in an action by his principal. *Dixon v. Cooper*, 3 *Wils.* 40. And, in like manner, a factor, who was to have all above, a certain sum, was admitted to prove a contract above that sum, by HEATH and ROOKE J. (dissent. EVANS C. J.) for this was still in the ordinary course of business. *Benjamin v. Porteus*, 2 *H. Black.* 590.

5. *A.* having received money as for the use of *B.* was admitted, in an action by *B.* for the money, to prove that he was agent; not on the ground of necessity, but because he stood indifferent in point of interest between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant. *Ilderton v. Atkinson*, 7 *T. Rep.* 480. So the captain of an *Indiaman*, having borrowed money of the plaintiff, was permitted to prove it borrowed for the use of the ship, in an action against the owners, on the principle that he was indifferent between the parties, being in all events answerable to one or the other. *Evans v. Williams*, 7 *T. Rep.* 487, note (c). So the master of a ship for which the plaintiff had supplied provisions, was admitted so prove that the defendant was liable as being owner. *Rowcroft v. Basset*, *Sitt. at Guildhall, after Hil. T.* 1802, cor. Lx BLANC, J. M. S. (u) And where an endorser of a note had received money from the drawer to take it up, it was held that he was competent to prove, in an action against the drawer by an endorsee, that he had satisfied the note, being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received, if the action succeeded: *Birt v. Kershaw*, 2 *East*, 458. But where a bill was accepted for the accommodation of the drawer, the Court of Common Pleas held that he was not a competent witness to prove it usurious, having a greater interest to defeat the action on account of the costs he would be liable to pay the acceptor, than to support it, whereby he would be liable to the bill without costs. *Jones v. Brook*, 4 *Taunt.* 464. Vide ante, 228, note (*).

6. *A.* delivered *South Sea* bonds to *B.* from whom they were stolen: when presented for the payment of the interest, they were stopped by *C.* (a clerk,) against whom *D.* the holder, brought trover, which the Company defended, on having a

bond of indemnity from *B.* This bond prevented *B.* from being examined as a witness in the action against *C.* *Ball v. Bostock*, 1 *Str.* 575. Ch. III. s. 3. Servants and Agents.

But *A.* having afterwards brought trover against *D.*, *B.* was held a good witness in such action. *ibid.*

7. In an action brought against the master for an injury, by the negligence of the servant, he is not a witness for his master until released. Therefore a bailiff, to whom a warrant is directed, cannot be examined for the Sheriff in an action for escape. *Powell v. Hard*, 1 *Str.* 650. 2 *Lord Raym.* 1411. Nor a servant, whose business it is to take care of the pipes of the *New River Company*, through a defect of which the plaintiff met with an accident. *Green v. New River Company*, 4 *T. Rep.* 589. But if the master release the servant in such case, he is a good witness. *Jervis v. Hayes*, 2 *Str.* 1083.

8. So in an action for sinking a barge, on board of which the plaintiff had a cargo of corn, the master is a good witness when released by the plaintiff. *Spitty v. Bowens*, *Peake's N. P. Cas.* 53.

9. But without such release he is not; and, in like manner, in an action on a policy on goods, on board a ship, the master and owner was held not a competent witness to prove the ship seaworthy, without a release by the plaintiff. *Rotherpe v. Elton*, *Peake's N. P. Cas.* 84. *Fox v. Lushington*, *ibid. note.*

10. So in an action on a policy of insurance, stating a loss by the barratry of the master, he cannot be a witness for the underwriters to prove the deviation made with the consent of the owners, unless released by the defendant, for if the plaintiff succeeds on his barratry, he is answerable to the underwriters. *Thompson v. Bird*, 1 *Esp. Cas.* 339.

11. A servant for beating whom his master has brought trespass, may be a witness to prove the beating. *Deal v. Harding*, 1 *Str.* 595, and *Lewis v. Fog*, 2 *Str.* 944, contrary to *Dansteley v. Westhouse*, 1 *Str.* 414, which is over-ruled; and, in like manner, the plaintiff's daughter being seduced, is a good witness to prove the seduction. *Cock v. Wortham*, 2 *Str.* 1054; but she cannot give evidence of a promise of marriage to increase the damages. (x)

12. On an information for importing teas from a country in which they were grown, contrary to the Act of Navigation, the defendant called the master of the ship; but his evidence was rejected, though there had been no information against the ship, because by the Statute it is forfeited, and he would be answerable over to the owners. *Fuller v. Jackson*, *Bomb.* 140. In like manner, in an information for importing *India* silks, the master of the ship was rejected, because he being an abettor, would be liable to a penalty of 500*l.* *Ricksen v. Sanforth*, cited *ibid.*

So in an information for importing brandy in unsizable casks, the master of the ship was rejected, being liable to a penalty of 100*l.* for 'breaking bulk. *Spong v. Fassing*, *Bomb.* 203.

Note. It is observed in the report of the case of *Fuller v. Jackson*, that this objection never was allowed before; and a case is mentioned to have happened at the same sittings, where on the like objection being made to the master of a cart (which by Stat. 6, and 3 *Geo.* 1, is forfeited) for running goods, it was disallowed.

13. In actions by informers for selling coals without measuring by the bushel, the servants are witnesses for the master, notwithstanding 3 *Geo.* 2, inflicts a penalty upon them for not doing it; though *ERNE J.* did on that account, in two or three

(x) In an action of trespass for taking and impounding the hogs of the plaintiff, the defendant proved that he acted as the agent or servant of *G.* on whose land the hogs were found, and offered *G.* as a witness, after executing a release to him, to prove that the hogs were taken *damage feasant*; and it was held, that *G.* was a competent witness. *Hasbrouck v. Lowm*, 8 *Johns. Rep.* 377. Et vide *Carrell v. M^r Wharter*, 2 *Bay's Rep.* 463.—*AM. ED.*

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Servants and
Agents.

instances, refuse to receive them. Per LEE C. J. in *E. I. Comp. v. Gosling*, *Bul. N. P.* 339. (y)

(y) An auctioneer who has sold goods to *A.* and committed them to the care of his servant, to be delivered to the vendee on his performing the conditions of sale, is a competent witness for the plaintiff in an action of replevin brought by the servant against *A.* who had obtained possession of them by artifice and deceit. *Harris v. Smith*, 3 *Serg. & R. Rep.* 20.

A ship's agent in a foreign port, is a good witness to prove by whom goods were shipped. *Andre v. Care*, 3 *Yeates' Rep.* 101. Vide ante, p. 40. n. (i) p. 321. et seq.—*AM. Ed.*

(C) *Witnesses in cases of bankruptcy and insolvency. Vide (E) 8.*

In cases of bankruptcy, it is the obvious interest of the creditor, to increase the divisible fund of the bankrupt, and the bankrupt himself also has the same interest, because he thereby increases his own allowances; for this purpose, therefore, neither are admitted as witnesses during the continuance of that interest; and, by the policy of the bankrupt laws, the bankrupt himself cannot at any time give evidence to support his own commission. (z)

(z) A person who has become a bankrupt, and been discharged in *Great Britain*, and against whose property in *New York* an attachment has issued, under the absent and absconding debtor Act, cannot be a witness in favour of his trustees under that Act, although he has released his interest in the surplus of his estate to his assignees in *Great Britain*, and to his trustees here. *Graves et al. v. Delaplaine*, 14 *Johns. Rep.* 146.

A. who had been discharged under the bankrupt Law, and whose estate would not probably pay more than 25 per cent., was held a competent witness, in a suit brought by the assignees of *B.* a bankrupt, against whom *A.* had proved a debt under the commission. *Phoenix v. Assignees of Ingraham*, 5 *Johns. Rep.* 412.

Where a debtor assigned his property to *A.* for his and the benefit of his other creditors, the debtor is not a competent witness for *A.* unless he release all his interest in the fund. *Main v. Newson*, *Anth. N. P.* 11.

A bankrupt who endorsed a note before his bankruptcy, and who has obtained his certificate, is a good witness for the endorsees in an action on the note against the maker. *Murray et al. v. Marsh et al.* 2 *Huyw. Rep.* 290.

A bankrupt, if he release any benefit by an increase of the fund, may be a witness in an action by his assignees. *Marks v. Barker*, *C. C.* Oct. 1804, *M. S. Rep.*

He may be a witness, although the names of his assignees were not substituted in the action, immediately on his obtaining a certificate of conformity. *Browne v. Ins. Co. Penn.* 4 *Yeates' Rep.* 119.

So where the plaintiff had become a bankrupt after suit was brought, which was abandoned by his assignees. *M'Clenachan v. Scott*, cited 2 *Dall. Rep.* 173, n.

A petitioning creditor for a commission of bankruptcy, is a competent witness to prove his debt, on which the commission of bankruptcy issued, in an action in the event of which he is not interested. *Farrington v. Farrington*, 4 *Mass. Rep.* 237.

Where the trustee of an insolvent debtor sues for a horse belonging to the insolvent's estate, the insolvent is not a competent witness to prove the property in him-

1. Agreeable to these principles, it has been held, that upon an issue out of Chancery, to try whether a bankrupt has lost money by gaming, a creditor of the bankrupt cannot be examined as a witness to prove the fact of his having so lost money, for he thereby increases the divisible fund, by depriving him of his allowance. *Shuttleworth v. Bravo*, 1 *Stra.* 507.

Ch. III. s. 3.
In cases of
bankruptcy
and insolvency.

2. But in an action against a man who pleads his discharge under an Insolvent Act, another creditor, who is no party to the cause, may be admitted to prove the defendant not within the description of the Act; for he is not immediately interested, nor will the record be evidence for him in any future action of his own. *Norton v. Crost*, 1 *Stra.* 650.

3. Neither can a creditor prove the act of bankruptcy, for he is interested to support the commission, (*Koopes v. Chapman*, *Peakes's Cas.* 80;) unless he release his debt to the assignees, in which case he may, though the bankrupt himself is party to the action in which the commission is disputed. *ibid.* *Ambrose v. Clendon*, *Cas. Temp. Hard.* 267. A creditor, who has sold his chance of recovering a debt, and whose interest is thereby removed, is a good witness to prove the petitioning creditor's debt, in an action by the assignees, (*Granger and another, assignees v. Furlong*, 2 *Black.* 1273;) or to increase the fund (*Heath v. Hull*, 4 *Taunt.* 362.) And one who has not proved under the commission, is competent to support it (though not to increase the fund) without giving any release. But a petitioning creditor cannot be a witness to prove the regularity of the commission though he does release, for he still remains liable on his bond. *Green v. Jones*, 2 *Campb.* 421.

4. The bankrupt himself cannot, in any case, be permitted to prove his own bankruptcy, the petitioning creditor's debt, or his trading, though he has obtained his certificate, and released his surplus and allowance. *Field v. Curtis*, 2 *Stra.* 829. *Chapman v. Gauthier*, 2 *H. Black.* 279. And if a joint commission issue against two, one cannot be called to prove an act of bankruptcy committed by the other. *Flower v. Herbert*, cited 9 *H. Black.* 279. But if the assignees prove an act to have been committed by the supposed bankrupt, which is equivocal, he may be called as a witness by the other side to explain the act, and shew that he did not thereby become a bankrupt. *Oxlade v. Perchard*, 1 *Esp. Cas.* 287.

5. As a bankrupt cannot increase his fund while interested, it follows that he cannot, in any case, be examined for his assignees, while uncertificated; but after certificate, he may release his allowance and surplus to his assignees, and thereby be made a competent witness to increase the fund, for he has then no interest in it. *Butler v. Cooke*, *Cowp.* 70. So if his allowance has been paid, he is competent for he is not bound to refund. *Russell v. Russell*, 1 *Brown*, 269. But where a second commission has issued, he cannot be a witness to increase the fund under it, till he has actually paid 15s. in the pound; for his future effects are not discharged by his certificate till that is paid, and therefore he is still interested to increase his fund, notwithstanding his certificate and release. *Kinnet v. Greenwellers*, *Peakes's Cas.* 3.

6. But to decrease his estate, as by proving in an action against A. that he was the debtor, a bankrupt is a good witness, though he has not obtained his certificate, *Walker v. Walker*, cited *Cowp.* 70.

self, though he appeared by his schedule to be entitled to no surplus. *Bussy v. Ady*, 3 *Har. & M. Hen. Rep.* 97.

A bankrupt is a competent witness to diminish the fund, out of which his allowance proceeds, because it is against his interest. *Barclay's assignees v. Carson*, 2 *Bay's Rep.* 243.

Where the plaintiff had become a certificated bankrupt, since the bringing of the suit, and the assignees had carried on the suit and entered into security for the costs, the Court admitted him as a witness. *McEwen v. Gibbs*, 4 *Dall. Rep.* 137.—*AM. Ed.*

(D) *Of witnesses on indictments for forgeries.*

1. The name of *A.* being forged to a receipt, he was held an incompetent witness to disprove the hand writing on an indictment for the forgery. *Rex v. Russell, Leach's Cro. Cas.* 10.

2. So where a person, having a bill of exchange in his possession, endorsed a receipt with a fictitious name on it, the acceptor was held not to be a competent witness to prove the payment, without a release from the endorsee. *Rex v. Taylor, ibid.* 255.

3. So the person whose hand writing was forged to a letter of attorney to receive stock, was held incompetent to disprove his hand-writing. *Rex v. Rhodes, 2 Stra.* 798. Note, in *Rex v. Parr, Leach's Cro. Car.* 487, it is said, that the stockholder was admitted in that case (which was an indictment for personating him to receive a dividend) to prove the amount of the stock he had and the dividend due to him. And in a late case of a prosecution for the forgery of a promissory note, on which there was an endorsement, in the prisoner's hand writing, that a year's interest had been paid, the person whose name was forged having been admitted to prove that he had never paid the money mentioned in the receipt, and a case being reserved on this point, some of the Judges thought, that as the forgery had been proved before, the witness was admissible to prove this fact, but the majority thought otherwise, because the fact was not perfectly collateral, but might conduce to the proof of the forgery. *Crocker's Case, 2 Bos. & Pull. N. R.* 87.

4. So the assignee of a certificate to a navy bill, whose name is charged to have been forged to a receipt for the money, is not a competent witness. *Rex v. Thornton, ibid.* 723.

5. In like manner, on an indictment for forging a seaman's will, an executor, named in a subsequent will, is not a witness to prove the first a forgery. *Rex v. Rhodes, ibid.* 29.

6. But where a bank note was forged in the name of one of the cashiers, he, not being personally chargeable, was held to be a witness to prove the forgery, though he had given security for the faithful discharge of his duty. *Rex v. Newland, ibid.* 350.

7. In like manner, where *A.* remitted a bill to *B.* (which was made payable to him) for the purpose of paying the debt of *A.* to a third person, and not on his own account, *B.* never having received the bill, and having no interest in it, was deemed a competent witness to prove a forgery of his name to an acquittance on the back. *Rex v. Sponsonby, ibid.* 374.

8. And where a banker had paid a forged draft, and being afterwards convinced of the forgery, had struck the money out of his account with the person whose name was forged, the supposed drawer was also admitted to be a witness. *Rex v. Usher, ibid.* 37.

9. So where a man was indicted for forging a receipt, and the person whose name was forged had recovered the money from the prisoner, he was admitted a witness per *WILLES C. J. Wills's Case, Bul. N. P.* 289.

10. Persons interested may in this, as in other cases, be made witnesses by a release; as the supposed obligor in a bond, may be a witness when released by the obligor, (*Dr. Dodd's Case, Leach's Cro. Cas.* 184; or the acceptor of a bill, when released by the holder (*Taylor's Case, ante, pla.* 2.) and the like.

11. As was before stated, the case of an indictment for forgery is considered as an anomalous case; it has therefore been held that the rule does not apply to civil actions, but that in such cases the party whose name has been forged may be called to prove the forgery without any release. *Hunter v. King, 4 Barn. & Ald.* 299. —Vide *ante*, p. 218.—AM. EN.

(E.) *Of persons who may be answerable over, or have themselves contracted.*

WHERE a person has entered into a contract with another, his ability to fulfil which is afterwards disputed by a third person in a Court of Justice, and the consequence of a recovery by the third person, would be an immediate right in the person with whom the contract was made to recover against the other who contracted with him, it follows that such contractor cannot be examined as a witness in his behalf, till released by him :—Therefore,

1. If a vendor of an estate covenant for the title, or warrant the premises, he cannot be a witness to support the title of the vendee in an action against him by a third person, for the premises, (2 *Roll's Abr.* 685); but a vendor who does not covenant for the title, or enter into any warranty, is a good witness. *Bushy v. Greenstade*, 1 *Sra.* 445. If *A.* sell a horse to *B.* with a warranty of soundness, and *B.* afterwards sell to *C.* with a like warranty, *A.* is a witness for *B.* in an action by *C.* on the warranty: for the horse might be sound when sold by *A.* though unsound when sold by *B.*; so that the liability of *A.* is not a necessary consequence of the recovery against *B.* *Briggs v. Crick*, 5 *Exp. Cas.* 99.

2. In a covenant for rent upon a lease by *A.* to *B.* the defendant pleaded, that *C.* and *D.* being seised in fee, before the demise in the indenture, demised to *E.* who entered upon defendant's possession. The replication admitted the seisin of *C.* and *D.* but stated that they demised to plaintiff before they demised to *E.*, and *C.* was held a competent witness to prove the point in issue, for the verdict could not be given in evidence in any action which might afterwards be brought either by or against him. *Bell v. Harwood*, 3 *T. Rep.* 308. But if two persons are contending for the possession, who are to pay rent in different rights, there the landlord could not be admitted a witness to prove the demise. Per *BULLER*, *ibid.*

3. If *A.* agree to indemnify *B.* (a candidate at an election) against a moiety of the expenses, he cannot be a witness for *C.* (an agent of *B.*) in an action against him for expenses incurred in the election, for he is liable to a moiety of the costs under his indemnity. *Trelawney v. Thomas*, 1 *H. Black.* 303.

Persons who are jointly liable with the party to the cause, cannot be witnesses to defeat the demand, though not made parties, if they are thereby benefited:

4. Thus a man, who was proved to be a partner with the defendant, was not permitted to be examined for the purpose of proving that he was solely liable, and that the defendant was his servant, because by that evidence he discharged himself from the costs to which he was liable. *Goodacre v. Breame*, *Peake's Cas.* 174. But if his supposed partner had released him from those costs, he might have been a witness; and therefore where *A.* being sued, pleaded that the contract was made by him jointly with *B.* which fact was traversed, *B.* on being released by *A.* was permitted to prove it. *Young v. Bairner*, 1 *Exp. Cas.* 103. But if two persons jointly contract, and after the death of one an action is brought against the survivor, the next of kin of the deceased contractor may be called as a witness for the plaintiff, to prove the joint contract; for the same evidence which fixes the debt on the survivor, creates a charge against himself for a moiety. *Burton v. Burchall*, *B. R. Hil.* 48 *Geo.* 3. Note. In this case there was no other witness. If to an action brought by *A.* alone, it be objected that the name of *B.* is used as a partner with *A.* and therefore that the action in the name of *A.* alone cannot be supported, *B.* may be called as a witness to prove that in fact he has no interest. *Parsons v. Crosby*, 5 *Exp. Cas.* 199.

5. Where several partners of a ship by deed appointed a ship's husband, and he laid out a sum of money in insuring the whole ship, and brought several actions

Ch. III. s. 3. against each for the whole money, the defendant in one action was held to be incompetent to prove, on the trial of the other, that the money was laid out against the consent of the owners. *French v. Backhouse. Same v. Fuleton*, 5 Burr. 277. Persons answerable over.

6. In an action against an administrator, a co-obligor in a bond to the ordinary under the Statute of Distribution, was held to be competent to prove a tender of the debt, for he was not interested in that cause, and the bare possibility of his being liable to an action in a certain event, was no objection to his testimony. *Carter v. Pearce*, 1 T. Rep. 163.

7. No person who has made himself liable in a secondary degree, as bail, the guardian of an infant on record (*Clutterbuck v. Lord Huntingtower*, 1 Stra. 506,) the *prochein amy*, or in short any person who has undertaken to pay the costs, (*Hopkins v. Naale*, 2 Stra. 1036, *Cas. Temp. Hard. 902*;) can be examined as a witness for the person on whose behalf he has made himself liable; but in these cases the Court will, on motion, permit another person to be substituted for him, in order that he may be a witness.

8. In an action by the obligee of a joint and several bond against one of the obligors, who was surety for another who had become bankrupt, and against whose estate the plaintiff had proved his debt, and thereby relinquished his action against him; by sect. 14 of Stat. 49 Geo. 3, c. 121, the bankrupt, not having obtained his certificate, and therefore being liable to be sued by his surety in case of a verdict by the plaintiff against him, is not a competent witness to prove payment. *Twinn v. Downing*, 14 East, 565.

(F.) *Of persons themselves liable charging others, vide ante (B.); or coming to claim property in themselves.*

1. Persons who are primarily liable, are never permitted to charge others by their evidence until released, unless in cases where they stand indifferent; and therefore where a workman has been employed to do work about the house of A. and he afterwards brings an action against another workman, who contracted to do the whole for a certain sum, A. cannot prove this case till released by the person so bringing the action. *New v. Chidgy, Peake's Cas.* 98.

2. But a person who gives a bribe to another, at an election of members of Parliament, is a competent witness to prove the fact in an action on the Statute, though he thereby discharges himself from the penalty; for by this provision the Legislature intended he should be a witness. *Mead v. Robinson, Willes*, 423. So the person bribed is, in like manner, a witness. *Bush v. Rawlins*, before Fortescue J. at *Shington* Sum. Assizes, cited *Camp.* 199, and reported by the name of *Bush v. Rawlins, Say*, 239. This doctrine was afterwards doubted, (*vide Edwards v. Evans*, 3 East, 451,) but in a subsequent case the Court confirmed it; and held, that even though the witness intended to use the verdict for his own indemnity, yet that he was a witness of necessity. *Howard v. Shipley*, 4 East, 180.

3. A man who has been arrested, and suffered by the Sheriff to escape, is a competent witness to prove the escape, for he is not discharged by a recovery against the Sheriff. *Cass v. Cameron, Peake's Cas.* 124. *Rex v. Warden of the Fleet*, *Bul. N. P.* 67. So a person rescued is a witness for the defendant in an action against him for the rescue. *Wilson v. Gary*, 6 Mod. 211. But where A. brought trespass against the Sheriff, for taking his goods under an execution against B. the Court held that B. was not a witness to disprove an assignment of them from himself to A. under which assignment A. claimed. *Bland v. Anley*, 2 Bos. & Pul. N. R. 331.

4. In an action against the acceptor of a bill of exchange, brought by the endorsee, the defendant offered to call the endorser to prove that he endorsed the bill to the plaintiff to receive as agent for him, and that he was still beneficially entitled to it, but the Court held him an incompetent witness, as coming to prove a right in himself, which would be benefited by defeating the plaintiff's action. *Buckland v. Tankard*, 5 T. Rep. 578. Ch. III. s. 3. Persons themselves liable, &c.

5. In an action of trover for a horse, a witness may be called to prove that the plaintiff agreed to his taking the horse as a security for money due to him from the plaintiff, and selling it if the money was not paid on a day certain, and that the money not being paid the witness accordingly sold the horse to the defendant; for the verdict to be obtained on his evidence will not avail him in an action to be brought against him by the plaintiff. *Mix v. Cutting*, 4 Taunt. 18.

6. Where two persons have joined in a promissory note, and the payee brings an action against one only, he may call the other to prove the signature of the defendant. *York v. Blott*, 5 M. & S. 71.

SECTION IV.

Of persons incompetent by reason of their relation to the parties.

In the preceding sections, our attention was confined to persons whose evidence is excluded on account of imbecility, crime, or interest. We are now to consider those who stand in a different situation, and are excluded not by reason of any disability, but on account of higher duties, either domestic or public, binding them to silence. Ch. III. s. 4. Husband and Wife.

It has been before mentioned, that no one can be a witness for himself; and it follows of course, that husband and wife, whose interests the law has united, are incompetent to give evidence on behalf of each other; or any other person whose interests are the same;* and the law, considering the policy of marriage, also prevents them from giving evidence against each other; for it would be hard that the wife, who could not be a witness for her husband, should be a witness against him: such a rule would occasion implacable divisions and quarrels between them.^(a) Bal. N. P. 286.

* Therefore, if two persons are jointly indicted for an assault, the wife of one cannot be admitted as a witness for the other. *Rez v. Frederick and Tracy*, 3 Stra. 1095.

(a) *Mr. Nally*, in his *Rules of Evidence*, p. 181, says, that he has not discovered any case of high treason where the wife was examined as a witness against her husband.

If a husband be indicted, and on his trial jointly with others, the wife is not a

Ch. III. s. 3.
Husband and
Wife.

Vide 1
Brownl. 47;
2 Keb. 403.
1 Hal. P. C.
301.
Hawk. P. C.
lib. 2, c. 46,
s. 16.
1 State Tr.
265. 289.
Hutton, 115.
Vide Sir T.
Raym. 1.
Rex v. Azire,
1 Stra. 633.

The rule extends even to criminal prosecutions, except the case of high treason, where it has been said, the law deems the allegiance due to the Crown paramount to every private obligation: (though even this has been doubted) and as we have before seen, that witnesses in some degree interested may be admitted where absolute necessity requires it, so where the husband has committed personal violence on the wife, she may, from the necessity of the case, be examined as a witness against him; as in the case of *Lord Audley*, who was indicted for assisting in the rape of his wife; and though the propriety of this decision was at one time doubted, yet reason seems strongly to support it; and more modern cases have adopted the practice, and admitted her evidence against her husband of personal violence, or ill-treatment of herself. (b)

Bul. N. P.
287.

Hawk. lib. 2.
c. 46, s. 16.

1 Hal. P. C.
693.

Monroe v.
Twisleton,
Append.

It is clearly settled, that a woman who never was legally the wife of a man, though she has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife: so if a woman be taken away by force and married; on an indictment against the husband *de facto*, founded on the Statute 3 Hen. 7, she is a witness to prove the fact, because the contract of marriage being obtained in express violation of that law, has no binding operation. But on an indictment for bigamy, the first wife is no witness to prove her marriage, because she is legally his wife, and therefore incompetent to give evidence against him. And if a woman who was once legally the wife of a man, be divorced *a vinculo matrimonii* by Act of Parliament, she cannot afterwards be called as a witness

competent witness for any of the defendants. *Commonwealth v. Eastland et al.* 1 Mass. Rep. 15.

Quere, Can a husband be admitted to prove a fact which amounts to adultery in the wife, as it is against good manners and common decency that such evidence should be received. *The Inhabitants of Canton v. Bentley*, 11 Mass. Rep. 441.

If the wife of the obligor attest the bond, she is no witness, and proof of her hand writing will not be received. *Nelius v. Brickell*, 1 Hayw. Rep. 19.

In suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a competent witness, and the jury are to judge of her credibility. *Baring v. Reeder*, 1 Hen. & Munf. Rep. 154.

The declarations of the wife, will not be received for or against her husband. *Les. of Watson v. Bailey*, 1 Binn. Rep. 470.—AM, Ed.

(b) The deposition of a wife on her death bed, charging her husband with murdering her, was admitted as evidence against her husband, on his trial for the murder. *Pennsylvania v. Stoops*, *Addis. Rep.* 332.—AM, Ed.

against him to prove any fact which happened during the cover-
ture ; but she is competent to give evidence of transactions
which took place subsequent to the divorce.(c)

Ch. III. s. 4.
Husband and
Wife.

The rule of law does not merely prevent a husband or wife from giving evidence for the purpose of criminating each other, it goes much further, and precludes any evidence which has the *least tendency* to it, or which directly prejudices the civil rights of either. Neither in a civil action, nor a criminal prosecution, are they permitted to give any evidence which, in its future effects, may criminate each other ; and this rule is so inviolable, that no consent of the other party will authorise the breach of it.(d) But in civil actions, where neither is a party, the wife may be called as a witness to prove facts which may eventually charge the husband with a debt.*

(c) *State v. Phelps*, 2 Tyl. Rep. 874.—AN. ED.

(d) Where the wife acts as the agent of the husband in the management of a tavern, he being insane, her declarations shall be received as evidence against the husband. *Hughes's adms. v. Stokes's adms.* 1 Hayw. Rep. 322.

In an information against the wife, for adultery, the husband cannot be a witness. *State v. Gardner*, 1 Root's Rep. 485.—AN. ED.

* In an action for a malicious prosecution, the defendant was willing that the plaintiff's wife should be examined. Lord HARDWICKS, "The reason why the law will not suffer the wife to be a witness for or against her husband, is to preserve the peace of families, and therefore I shall never encourage such consent;" and she was not examined. *Barker v. Sir Woolston Dixie, bart.* Cases Temp. Hard. 264.

In ejectment the plaintiff made title to his lessor to the lands in question, as son and heir to *Jerome Jaques*, and *Hannah* his wife, in right of *Hannah*. The defendant gave in evidence that *Jerome Jaques* was married before he was married to *Hannah*; and the woman to whom it was supposed he was married before, was produced at the trial, (Sum. Assiz. 13 W. 3, at *Maidstone*,) to prove this marriage. The council for the plaintiff opposed her testimony, because she swore for her advantage ; viz. to have a husband, the husband being then living. But nevertheless GOULD J. of the King's Bench, then Judge of assize, admitted her testimony. But afterwards the same title, between the same parties, was tried before HOLZ C. J. at the assizes in *March*, at *Maidstone*, 1 *Anne, Reg.* and he refused, after debate, to admit the former wife to be a witness for this purpose : but upon other evidence, the former marriage was proved to the satisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the same trial before GOULD J. the jury found a verdict for the plaintiff. *Broughton v. Harper*, 2 Lord Raym. 752.

In an action by a plaintiff, as a feme sole, for goods sold, &c. the defendant called the husband as a witness, to prove that she was a married woman ; and he was admitted, and the plaintiff was consulted. On a motion to set it aside, the majority of the Court thought he was not admissible on the ground of policy ; BULLER J. doubted at first, upon the ground that the husband was not interested in that case, but he afterwards acceded to the opinion of the Court, upon the broad ground adopted by them, of the impolicy of permitting husband and wife to give evidence for or against each other. *Bentley v. Cook*, cited 2 T. Rep. 265.

Ch. III. s. 4.
Professional
confidence.

In like manner, as the law respects the private peace of men it considers the confidential communications made for the purpose of defence in a Court of Justice. By permitting a man to intrust his cause in the hands of a third person, it establishes a confidence and trust between the client and the person so employed. A *counsel*, *solicitor* or *attorney*, cannot conduct the cause of his client if he is not fully instructed in the circumstances attending it: but the client could not give the instruc-

Wilson v.
Rastal, 4 T.
Rep. 753.

In the case of the *King v. The Inhabitants of Cliveger*, 2 T. Rep. 263: On an appeal against an order of removal, the respondents proved a marriage in fact between the paupers; and the appellants contending that the husband had a former wife living, called him, but he denying the fact, they offered to call her for the purpose of proving it. The sessions rejected her evidence, and the question coming on before the Court of King's Bench, the Judges of that Court were also of opinion that she was an incompetent witness. *ARMISTEAD J.* said, "The ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or the wife are directly accused of any crime, but even in collateral cases, if their evidence tends that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury, as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended. In that point of view, therefore, I am of opinion, that her testimony ought not to have been received, because it is an established maxim, that husband and wife shall not give evidence to criminate each other." *GRANVILLE J.* said, "The general rule, as to husband and wife being witnesses, was founded not on interest, but on policy; by which it was established, that a wife should not be called to give testimony in any degree to criminate her husband;" and *LORD HALK* says, that she shall not be called even indirectly to criminate him; and that rule seems to have governed all the decisions from that time to the present. The true and just ground of objection is not that of interest, but is founded on the political inconvenience of causing dissensions in families, between husband and wife, and so it is put by *LORD HALK*.

In *Davies v. Dinwoody*, 4 T. Rep. 678, which was an action brought by the trustees, under a marriage settlement, whereby goods were seoured to the wife, against the Sheriff for taking them under an execution against the husband; he was called to prove the identity of them: an objection was made to him on account of interest; and on the case coming before the Court, the plaintiff's counsel argued that she was not interested; but it was answered per *LORD KENYON C. J.* that independently of the question of interest, husbands and wives are not admitted as witnesses, either for or against each other: from their being so nearly connected, they are supposed to have such a bias upon their minds, that they are not to be permitted to give evidence for or against each other.

It is observed in the text, that between third persons, a wife may be admitted to give evidence, which throws the demand upon her husband. Thus in an action against the daughter's husband for her wedding clothes, her mother was admitted to give evidence, which shewed that they were delivered on the credit of the mother's husband. *Williams v. Johnson*, 1 Stra. 504.

tions with safety, if the facts confided to his advocate were to be disclosed. Barristers and attorneys, therefore, to whom facts are related professionally, during a cause, or in contemplation of it, are neither obliged nor permitted, though they should so far forget their duty as to be willing to do so, to disclose the facts so divulged, during the pendency of that cause, or at any future time ;(c) and if a foreigner, in communicating with his attorney, has recourse to an interpreter, he is equally bound to secrecy.(1) But where the attorney himself is, as it were, a party to the original transaction, as if he attest the execution of a fraudulent deed,* (2) was present when his client was sworn to answer in Chancery,(3) or employed as the steward or agent,†

Ch. III. s. 4.
Professional
confidence.

(1) *Du Barre v. Livette*,
Peake's Cas.
77.

(2) *Duffin v. Smith*,
Peak.
Cas. 108.

(3) *Vide Doe dem. Jupp v. Andrews*,
Cowp. 845.
Bul. N. P.
484. 2 Stra.
1122, contra.

(c) An agent is bound to give in evidence, confidential communications made to him as such. *Holmes v. Comgye*, 1 *Dall. Rep.* 439. *Vide Morris's les. v. Vanderen*, *ibid.* 64.—AM. Ed.

* On this principle *Abbott C. J.* held that on a question whether the defendants were partners or not, an attorney who had been consulted by them professionally, as to the dissolution of their partnership, might be called to prove that fact, and stated the rule to be, that the protection was only extended to those communications which related to a cause existing at the time of the communication, or then about to be commenced. *Wadsworth v. Hamshaw*, cited 2 *Brod. & Bing.* 5. But in the case of *Cromach v. Heathcote*, *ibid.* the Court of Common Pleas ruled, that an attorney who had been applied to draw a bill of sale of goods, which he refused, considering it as a confidence which ought not to be broken. *RICHARDSON J.* said, "Suppose the case of an attorney, consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw?" *Quere*, Is not the one case, that of a confidential communication of a pre-existing fact, and the other, the doing of an act in which the attorney either does become, or is invited by the party to become a participator?

† *Wilson v. Rastal*, 4 *T. Rep.* 753. In an action on the Bribery Act, *W. Handley* was called, who deposed, that previous to the dissolution of Parliament, in the spring of 1790, he had received letters from the defendant, which he had given to Mrs. Handley, with directions to destroy them; but did not know whether she had done so or not. *B. Handley* was then called, who said he had the letters in question, which he received from Mrs. H. and that *W. H.* was at that time under prosecution for bribery, and he wished to render him what assistance he could. That Mrs. H. had desired him to destroy the letters, but that he had kept them. That there was no action now pending against *W. H.* but the two years were not expired. The letters were not, as he knew of, put into his hands with *W. H.*'s privacy, but he had kept them with his privacy or consent. *W. H.* had indeed desired him to destroy them, but he had not done so, for the same reason as he had not complied with the like request from Mrs. H. namely, that he had soon after the election stated, that *W. H.* acted only under the direction of the defendant in the election business. He further stated, that he was not then concerned in carrying on any suit for *W. H.*; that he never was attorney in any action of indemnity; that he had been applied to by *W. H.* to be concerned, but had declined it; giving as a reason,

Ch. III. s. 4.
Professional
confidence.

Cobden v.
Kenrick, 4 T.
Rep. 431.

and does not gain his knowledge of it merely by the *relation of the client*, the rule does not apply, for in these cases, there was no *professional confidence*, and he stands in the same situation as every other person. (f) In like manner, where after the compromise, though before the final conclusion of a cause, a party told his attorney, by way of exultation, that he had succeeded in recovering a sum of money to which he was not entitled; it was held that the attorney might prove this fact; because it was not a *confidential* communication for the purpose of enabling him to conduct the cause; and for the same reason, if an attorney in the course of a cause interrogate a witness, as to his knowledge of certain facts, and such witness, on being called in ano-

that he was under Sheriff, and a material witness in the cause. That he had not employed *W. H.*'s attorney for him, but that *W. H.* had consulted him in his profession as a confidential person, and had applied to him both before and after he had received the letters. He had desired the witness to consult with his attorney, which he had done, as well as with *W. H.* himself. The letters were communicated to him in consequence of *W. H.* applying to him professionally. On this case *Mr. B. Thompson*, who tried the cause, thought that *E. H.* was confidentially employed by *W. H.* and that therefore he could not be examined; but the Court afterwards, being of a contrary opinion, granted a new trial.

(f) A professional man, not employed by a party, is a good witness against him, though his knowledge be derived in the course of business. *Hoffman et al. v. Smith*, 1 *Caines' Rep.* 157. Et vide *Heister v. Davis*, 3 *Yeates' Rep.* 4. *Mills v. Griswold*, 1 *Root's Rep.* 383. *Sherman v. Sherman*, *ibid.* 486. *Calkins v. Lee*, 2 *Root's Rep.* 363.

But terms of compromise, offered by an attorney to his client's creditors, are not confidential, and must be disclosed. *McTavish v. Dunning*, *Anth. N. P. Cas.* 82.

It does not apply to a student in the office of an attorney. *Andrews et al. v. Solomons et al.* 1 *Peters' Rep.* 356.

An attorney or counsel cannot testify as to communications made by a client, whilst the relation of attorney or counsel and client subsists. *Yordan v. Hess*, 13 *Johns. Rep.* 492. *McTavish et al. v. Dunning*, *Anth. N. P. Cas.* 113.

But though he cannot be compelled to produce a deed or other instrument entrusted to him by his client, nor to disclose its date or contents, yet he may be called as a witness to prove its existence, and that it is in his possession, so as to entitle the opposite party, on his refusing to produce it on the trial, after notice for that purpose, to give parol evidence of its contents. *Brandt ex. d. Van Cortland et al. v. Klein*, 17 *Johns. Rep.* 335.

An attorney or counsel of the plaintiff or defendant, may be compelled to testify whether a deed described by the adverse party is in his possession or not, so as to authorise the other party, on his refusing to produce it, after notice for that purpose, to give parol evidence of its contents. *Jackson ex. d. Neilson et ux. v. McVey et al.* 18 *Johns. Rep.* 330.

An attorney or counsel of one of the parties, may be called to testify to a collateral fact within his knowledge, or to a fact which he might know, without its being entrusted by his client. *Johnson v. Daverne et al.* 19 *Johns. Rep.* 134. *Heister v. Davis*, 3 *Yeates' Rep.* 4.—A.M. Ed.

ther cause, give a different account from that formerly related by him to the attorney, the adverse party may call the attorney to discredit the witness by proving the relation made to him on such examination: so where a notice to produce papers, had been delivered to an attorney in the course of a cause, (1) it was held that the party giving such notice might call the attorney to whom it was delivered to prove the contents of it.

Ch. III. s. 4.
Professional
confidence.

Mr. Berkley's
Ev. in *Duchess
of Kingston's
Case*, 11 St.
Tr. 253.

This rule of professional secrecy extends only to the case of facts stated to a legal practitioner for the purpose of enabling him to conduct a cause; and therefore a confession to a clergyman or priest, for the purpose of easing the culprit's conscience, the statement of a man to his private friend, or of a patient to his physician, are not within the protection of the law. We should certainly think that the friend, or the physician, who voluntarily violated the confidence reposed in him, acted dishonourably; but he cannot withhold the fact, if called upon in a Court of Justice. (g)

(1) *Spenceley
v. Schulenberg*, 7 East,
357.

*Sparke's
case*, cited
*Peake's
Cases*, 77.
*Duchess of
Kingston's
Case*, 11 St.
Tr. 243, &c.

Where a man has, by putting his name to an instrument, given a sanction to it, he has been held by some Judges to be precluded or estopped from giving any evidence in a Court of Justice which may invalidate it; as in the case of a party to a bill of exchange or promissory note, who has been said not to be an admissible witness to destroy it, on the ground that it would be enabling two persons to combine together, and by holding out a false credit to the world, to deceive and impose on mankind. On this principle it was held, that an endorser could not be a witness to prove notes usurious in an action on a bond founded on such notes, though the notes themselves had been delivered up on the execution of the bond. At one time this seems to have been understood as a general principle, applying to every

*Vide Walton
v. Shelley*, 1
T. Rep. 296.

Ibid.

Bent v. Baker, Append.

(g) A confidential commercial agent or factor, may be compelled to give evidence, even of matters confidentially communicated to him. *Holmes v. Comegys*, 1 Dull. Rep. 439.

Sed dubitatur, in *Morris's les. v. Vanderen*, 1 Do. 66.

A confidential clerk, is not privileged from giving evidence of facts, which his situation as clerk enabled him to know. *Corp v. Robinson*, C. C. Oct. 1809, *M. S. Rep.*

Confessions made to a Roman Catholic clergyman in confidence, and whose duty it is to receive auricular confessions according to the canons of that church, will not be received in evidence. *Smith's Case*, 2 N. York City Hall Recorder, 77. Et vide note, *ibid.* p. 80. Et vide *Philip's Case* reported by W. Sampson, esq.

Yet admissions made by a prisoner to a divine of the Protestant churches, will be received. *ibid.* 77.—AM. EN.

Ch. III. s. 4. species of written instrument ; (h) but in a case where an underwriter of a policy of insurance was called to prove the instrument void as against another underwriter, and objected to on this ground ; the Court declared, that it extended only to *negotia-*

Persons who
have signed
an instrument,
&c.

ESTOPPELS.

(h) Vide ante, p. 71, n. (u).

If the principal in the letter of attorney under seal, give it a false anterior date for the purpose of legalising prior acts of the attorney, he is *estopped* to aver or prove that it was in fact executed at a subsequent period. *Milliken v. Coombs*, 1 *Greenl. Rep.* 343.

A grantor will not be permitted to explain his own deed, even where he is not interested. *Revere v. Leonard*, 1 *Mass. Rep.* 91.

In ejectment, the defence set up was a conveyance from the plaintiff to a third person before the suit, and to repel this the plaintiff was permitted to prove that at the time of executing the deed, both the grantor and grantee were out of possession. *Phelps v. Sage*, 2 *Day's Rep.* 151.

A deed, which on the face of it purports to be a defeasance, and to be executed at the same time with another, *estops* both parties from saying to the contrary. *Bridge v. Wellington*, 1 *Mass. Rep.* 219.

If a tenant in a writ of entry, wherein a freehold is demanded, plead the general issue, he thereby admits that he is tenant of the freehold, and is estopped from proving that he has not the freehold, but is a tenant at will. *Kelleran v. Brown*, 4 *Mass. Rep.* 448.

A confession by a plaintiff on record of the truth of the defendants plea of *plene administravit*, would forever be an estoppel to him in maintaining another action for the same cause. *Hunt v. Whitney adm. ibid.* 620.

So if one endorse a writ with his name only, without adding the capacity in which he acts, he will be estopped from denying that he endorsed as the plaintiff's agent. *Gilbert v. Nantucket Bank*, 5 *Do.* 97.

Where a security is in fact made contrary to the provisions of the Statute, the party attempted to be charged is not estopped from alleging any facts which shew its illegality. *Farrar adm. v. Barton et al. ibid.* 395. *Bayley et al. v. Taber et al. ibid.* 286.

A person having a right to recover in a real action, is not barred by the execution of a deed purporting to be a conveyance, but by which his right does not pass unless by way of estoppel, as between the parties to the deed. *Wolcot et al. v. Knight et al.* 6 *Do.* 421.

If in the course of pleadings, the party who relies on matter of estoppel, has no opportunity to plead it, he may shew it in evidence, but when the matter to which the estoppel applies is directly averred or denied by one party, and the other takes issue on the fact, instead of pleading the estoppel, he waives it, and the jury are at liberty to find the truth. *Howard v. Mitchell*, 14 *Mass. Rep.* 241.

The assignee of a reversion sues in debt for rent which was reserved by deed, to which the lessee pleads a parol agreement between him and the lessor, made before the demise, by which he was to lend to the lessor a sum of money, the interest of which was equal to the rent reserved, and payable on the same days, and that the rent and interest should be mutually set off against each other. It was holden a good defence to the action, and that defendant was not estopped from pleading it. *Farley v. Thompson*, 15 *Do.* 18.

In an action by a mortgagee for possession of the mortgaged premises, the mortgagor defended on the ground of usury ; but failing in proof, the mortgagee had judgment. Afterwards the mortgagor conveys his right to a third person, who

tible instruments, and he was admitted to give evidence destructive of the policy. It had been in former cases(1) determined, that a man attesting the execution of a will was not thereby estopped from proving the insanity of the testator, though it went much to his credit; and in a late case,(2) in

Ch. III. s. 8.
Persons who
have signed
an instrument,
&c.

brings his writ of entry against the mortgagee, and would support his action by proof of usury. It was holden that he was estopped by the former judgment, and that the mortgagee might avail himself of the estoppel without pleading it. *Adams v. Barnes*, 17 *Mass. Rep.* 365.

(1) *Wright dem. Clymer v. Little*, 3 *Burr.* 1244.
Lowe v. Joliffe, 1 *Blac.* 365.

A party is estopped from gainsaying a title which is recognised by a deed under which he claims. *Denn ex. d. M'Donald v. King et al.* 1 *Coxe's Rep.* 439. *Et vide Imbree v. Ellis*, 2 *Johns. Rep.* 119. *Arnold v. Bell*, 1 *Hayw. Rep.* 397.

(2) *Jordaine v. Lashbrook*, 7 *T. Rep.* 601.

Where a person conveys land in which he has no interest at the time, but afterwards acquires title to the same, he will be estopped from claiming in opposition to his deed, either from the grantee or any person deriving title under him. *Jackson ex. d. Danforth et al. v. Murray*, 12 *Johns. Rep.* 201. *Jackson ex. d. Stevens*, 13 *Johns. Rep.* 316. *Hawkins v. Hanson*, 1 *Har. & M'Hen. Rep.* 528.

But it does not apply as between vendor and vendee, especially where the latter has not received possession from the former. *Blight's les. et al. v. Rochester*, 7 *Wheat. Rep.* 535.

In *South Carolina*, the obligee of a bond was held to be estopped from invalidating his own instrument, by destroying the right of an assignee. *Canty v. Sumpter*, 2 *Bay's Rep.* 93.

So he is estopped to deny his right to convey. *Kid v. Mitchell*, 1 *Nott & M'Cord's Rep.* 334.

No title, not *in esse*, will pass by deed, unless it contains a warranty, in which case it will operate as an estoppel. *Jackson ex. d. M'Crackin v. Wright* 14 *Johns. Rep.* 198.

It is not a legal objection to a conveyance of lands in *Pennsylvania*, that the grantor is out of possession. *Steever v. Les. of Whitman*, 6 *Binn. Rep.* 416.

Estoppels extend to parties and privies, and will bind them. *Gray v. Harrison*, 2 *Hayw. Rep.* 292.

This general rule does not extend to the case of one who made a deed as attorney of another, though it would to his principal. *Ashton v. Jones*, *ibid.* 298.

If an executor or administrator confesses judgment, or suffers one by default, he is estopped from denying assets, to the extent of that judgment, as far as it regards the plaintiff therein. *Ruggles et al. v. Sherman*, 14 *Johns. Rep.* 446.

Where a Statute requires a bond to be taken in double the value of the thing concerning which it is executed, and the parties voluntarily, and without fraud, assent to the insertion of a given sum as equal to double the value, they are estopped to deny that is double the true value. *Speake v. U. States*, 9 *Cranch's Rep.* 28.
MARSHALL C. J. *dissonante*.

A tenant is estopped from contesting the title of his landlord. *Merwin et al. v. Camp. et al.* 3 *Con. Rep.* 35.

The plaintiff suing as administrator of a third person, is not estopped by the acts of his wife, when sole in her private capacity. *Millison v. Nicholson*, *Rep. in Ct. of Conf.* 499. 3 *C. 2 Hayw. Rep.* 306.

An assignee by estoppel, cannot be allowed to maintain an action of covenant. *Nesbit v. Nesbit et al. Tugl. Rep.* 82.

A party holding under a conveyance in fee, deduced from the husband of the demandant in dower, is estopped from controverting the seisin of the husband. *Bancroft v. White*, 1 *Caines' Rep.* 185.—*AM. ED.*

Ch. III. s. 4.
Estopped by
his own act.

(1) Rich v.
Topping,
Peake's Cas.
224. Esp. 177,
S. C.

Cowp. 594.

Goodright
dem. Stevens
v. Moss,
Cowp. 591.

which that of *Walton v. Shelley*, came to be re-considered, and underwent much discussion, it was solemnly decided by the Court of King's Bench, one Judge only (Mr. J. ASHHURST) dissenting, that in an action by an endorsee of a bill of exchange against the acceptor, the latter might call the payee and endorser to prove that the bill was void in its creation, as being drawn in *London* without stamp, though dated abroad; and that the case of *Walton v. Shelley* was not law. So in another case, (1) Lord KENYON held the endorser of a bill of exchange (he being released by the acceptor) a competent witness to prove that he parted with it to the plaintiff on a usurious consideration. We are now consequently to consider the rule as no longer existing.

It has in some cases been doubted also, how far persons who have passed as married to the world, may be admitted to prove they were not so, in a question as to the legitimacy of their issue, and several contradictory decisions have taken place on this point.* In questions of legitimacy, Lord MANSFIELD said, that as to the *time of the birth*, the father and mother were the most proper witnesses to prove it; and in the principal case, declarations of the deceased parents, that a child was born *before* the marriage, was admitted; but he added, that it was a rule founded

* *Rex v. Stockland*, Burr. S. C. 508. In a sessions case, proof was given, that two persons had cohabited together as man and wife for thirty years, and the sessions refused to hear the supposed husband examined, to prove that no marriage had in fact taken place between them, and the Court of King's Bench held the decision to be right. But in *Rex v. St. Peter*, Burr. Ses. Cas. 25; Bul. N. P. 112, it was held that the supposed husband was a competent witness to disprove the marriage.

In *Standen v. Standen*, Peake's Cas. 32. Lord KENYON permitted a man who had been in fact married, to prove that the banns of marriage were not duly published; and in a still later case which came before the Court, the reputed wife was held to be competent to prove she was not married. Thus, in

Rex v. Inhabitants of Bramley, 6 T. Rep. 330, on the hearing an appeal from an order of removal, the respondents produced evidence to shew the settlement of the pauper's father was at *Bramley*; and in order to prove his marriage with the mother produced witnesses to prove that they cohabited together, and were reputed as man and wife. The appellant offered to produce the mother to shew that she never was married, or that if she ever was, the ceremony took place in *Ireland*, under such circumstances as the appellants contended by the laws of *Ireland*, rendered it wholly void. This was objected to, and the Court of Quarter Sessions being of that opinion rejected it, subject to the opinion of the Court. Lord KENYON said, this evidence was certainly admissible, though the Justices of sessions were to judge as to the effect of it. His Lordship then mentioned *Rex v. St. Peter*, and said, there are many other cases in which it has been decided, that the parents may be called as witnesses with respect to the legitimacy of their issue; and if they may be called to prove they are legitimate children, there is no reason why they should be considered as incompetent, when called to prove that the children are illegitimate; but in all these cases such testimony is open to great observation.

in decency, morality, and policy, that they should not be permitted to say after marriage, that they had no connection, and therefore that the offspring was spurious, more especially the mother, who was the offending party; that point, his Lordship added, was solemnly determined at the delegates. The question of access or non-access, was totally different from giving evidence of the time of the birth; and it was clear, that the declarations of a father or mother could not be given in evidence to bastardise the issue born *after* marriage.*

Ch. III. s. 4.
Estopped by
his own act.

Ibid. 592.

* In *Rex v. Reading*, *Cas. Temp. Hard.* 79. On an order of bastardy, the person on whom the bastard was charged to be got was a married woman, and the Court held that she was competent to prove the criminal conversation of the defendant with her, but not the non-access of her husband. And in *Rex v. The Inhabitants of Kea*, 11 *East*, 132, it was holden that a woman was equally inadmissible to prove the non-access after her husband's death as in his life time. In *Rex v. Inhabitants of St. Mary Nottingham*, 13 *East*, 57, the Court held that a bastard might be examined to prove his own illegitimacy, and that the reputed father might also be examined, (if he chose to admit the fact) though he was not compellable to answer.

SECTION V.

Of persons who are privileged from giving evidence.

I OBSERVED before, that no one could be compelled to give evidence which tended to charge himself with a crime;*(i) and therefore the putative father of a bastard, though he may volun-

Ch. III. s. 5.
Privilege.

* As to a witness being interrogated to that which would render him liable to a criminal prosecution or in a civil suit, vide p. 236, n. (r).—A.M. Ed.

(i) In *Grinnell v. Phillips*, 1 *Mass. Rep.* 541, SENSWICK and SEWELL Justices, admitted one of the jurors to be sworn and examined respecting their conduct in finding their verdict. But in *Bridge v. Eggleston*, 14 *Mass. Rep.* 243, the Court said, "that it had been ruled in a capital case in *Suffolk*, that jurors should not be received to testify to the motives or inducements upon which they had joined in a verdict."

In *Vermont* it has been decided that the affidavits of jurors cannot be read to set aside their verdict. *Robbins v. Windover et al.* 3 *Tyl. Rep.* 11. *S. P. Harris v. Huntington et al.* *ibid.* 129.

The testimony of an arbitrator, is not to be admitted to impeach his award. *Underhill v. Van Cortland et al.* 2 *Johns. Chan. Cas.* 339.

Nor to prove a mistake. *Newland v. Douglass*, 2 *Johns. Rep.* 42.

Ch. III. s. 5
Privilege.

(1) *Rex v. St. Mary Nottingham*, 13 East, 57.

tarily come and state the fact, cannot be compelled to answer a question upon the subject; (1) and if a person who has been knowingly concerned in the writing or publication of a libel is called for the purpose of proving the fact, he may object to give

The affidavits of jurors cannot be received to impeach their verdict; but they may to exculpate the jurors, or in support of their verdict. *Dana v. Tucker*, 4 Johns. Rep. 487.

It seems that an arbitrator like a juror, is inadmissible to shew his own misconduct, in order to impeach his award. *Underhill v. Van Cortland*, 2 Johns. Ch. Rep. 349.

In *Burrell v. Philips*, 1 Gall. Rep. 364, a juror was examined to prove that he separated harmlessly, and had conversed with no one about the case.

Misconduct on the part of the jury to impeach their verdict, must be shewn by other testimony than their own. *State v. McLeod*, 1 Hawks' Rep. 344.

Neither the jurors nor the officer to whose care they were committed can be compelled to testify to the fact of their separation. *Howard v. Cobb*, 3 Day's Rep. 310.

In *Pennsylvania*, in the case of *Leib v. Bolton*, 1 Dall. Rep. 82, on a rule to shew cause why the return of a jury of inquiry should not be set aside, the depositions of the jurors were admitted.

But in *New Jersey* in a similar case, they were refused. *Schank v. Stevenson adm.* 1 Penn. Rep. 387.

In *Zuber v. Geigar*, 2 Yeates' Rep. 582, a paper of calculations was received from the jury to shew the mode of adjusting the verdict.

In *Comperthwaite v. Jones et al.* 2 Dall. Rep. 55, it appears that the affidavits of jurors were read to ascertain the manner in which the verdict was agreed upon. Et vide *Bradley's les. v. Bradley*, 4 Do. 114. Sed vide the strictures by YEATES J. on the report of this case in 4 Binn. Rep. 157.

In *Commonwealth v. Keffer*, Addis. Rep. 296, grand jurors were admitted to prove the intoxication of one of the grand jury.

In the case of *Les. of Cluggage v. Swan*, 4 Binn. Rep. 150, YEATES J. said, that the testimony of the jurors themselves was not admissible to impeach their verdict on the ground of misconduct.

In *New Jersey*, vide *Brewster v. Thompson*, 1 Coxe's Rep. 32.

In *Ritchie v. Holbrooke*, 7 Serg. & R. Rep. 458, where it appeared by the affidavit of one of the jurors, that after they had retired to consider of their verdict, that their foreman declared that the plaintiff had satisfied him with regard to a difficulty in the plaintiff's account, in a conversation he had with him out of Court, and after the jury were sworn, the Court granted a new trial.

In *Price's exr. v. Warren adm. of Fugua*, 1 Hen. & Munf. Rep. 385, the Court unanimously determined that a new trial ought not to be granted on the affidavits of two of the jurors that they were influenced in their verdict by information given by one of their own body in the jury room. Sed vide *Cochran v. Street*, 1 Wash. Rep. 103, where a new trial was granted on the affidavit of some of the jurors.

In *Anderson et al. v. Fox et al.* 2 Hen. & Munf. Rep. 245, it was decided, that where the damages were evidently excessive, the testimony of the jurors will be admitted to declare their motives in giving them.

In *North Carolina*, misconduct on the part of a jury, to impeach their verdict, must be shewn by other testimony than their own. *State v. McLeod*, 1 Hawks' Rep. 344.

So in *Kentucky*. *Taylor v. Giger*, Hardin's Rep. 586.

In *Maryland*, vide *Bladen's les. v. Cockey*, 1 Har. & M'Hen. Rep. 230.

For new trials, vide post. p. 263, Ch. III. s. 6.—AM. ED.

any evidence tending to prove his own criminality.^(k) It was also at one time held, that the law protected a man's pecuniary interests, as well as his person, and that therefore he was not compellable to give any answer which might subject him to a civil action, or charge himself with a debt⁽¹⁾ But as a man

Ch. III. s. 5.
Privilege.

(1) Title v.
Grevitt, 2
Lord Raym.
1008.

(k) The testimony of a witness tending to fix a fraud upon himself, ought not to be regarded. *Claiborne v. Parish*, 2 Wash. Rep. 146.

It is the uniform practice of Courts of Justice, to adhere to the maxim, *nemo tenetur seipsum accusare*, both as to witnesses and jurors. *Repubblica v. Gibbs*, 3 Yeates' Rep. 429. S. C. 4 Dall. Rep. 253. S. P. *Les. of Galbraith et al. v. Eichelberger*, *ibid.* 545.

In an action of debt to recover the penalty under the Act of Congress, May 10th 1800, for transporting slaves from one foreign port to another, a *particeps criminis*, after the expiration of two years from the commission of the offence, without any prosecution being commenced, may be compelled to testify against the defendant, though such witness has been out of the jurisdiction of the *United States*, a considerable part of the two years. *The United States v. Smith*, 4 Day's Rep. 121.—AM. ED.

* In *Maloney v. Bartley*, 3 Campb. 210, a person, who, by the direction of a magistrate's clerk, had written an extra-judicial affidavit, which was afterwards sued upon as a libel, was called for the purpose of proving that he had written it by the order of the defendant, and Mr. Baron Wood held, that he was not obliged to answer any question as to his writing it by the direction of the defendant; and in *Stevenson v. Jones*, *Stafford Sp. Assiz.* 1821, which was an action for a libel inserted in the *Stafford* newspaper, the printer having proved that certain alterations and interlineations were made after the libel had been delivered by the defendant to him, his servant was called, and proved that the word *Barton* (one of the interlineations) was written by him by the direction of *Bowers*, an occasional clerk of *Jones*. *Bowers* was then called and asked, whether he had given such direction. He objected to answer the question as tending to criminate himself, and the objection being supported by the defendant's counsel, and opposed by those of the plaintiff, PARK J. ruled, that he was compellable to answer, because he might by the direction of the defendant, or any other person, give orders for the alteration of a particular word without himself knowing the contents of the paper, and if he did not know them, he would not be guilty of a libel. He then swore that he ordered *Barton's* name to be inserted without any authority from the defendant; and upon this evidence the plaintiff failed as to his libel. Another libel being charged in the declaration, in which they were also certain interlineations of some length: *Bowers* was next examined as to them, and admitted they were in his hand writing, when the Judge interposed and said, that now no further questions could be asked, for it was impossible that he could make long interlineations without knowing the contents of the libel, and therefore any further evidence would tend to criminate himself. The plaintiff called several other witnesses for the purpose of bringing home the libel to the defendant, but not being able to do so was ultimately nonsuited.

† *Bain v. Hargrave*, K. B. Sit. at *Guildhall* after Hil. Term, 35 Geo. 3. M. S. *Assumpsit* for money had and received. The defendant had been clerk to the plaintiff, who was a considerable wharfinger, and had received several sums of money in that character, which had not been paid over to the plaintiff.

The defendant contended, that he was not liable to pay this money to the plaintiff, having paid it over to one *Wright*, another clerk of the plaintiff's, who was authorised to receive it from him.

Ch. III. s. 5.
Privil. ge.

Hawkins v.
Perkins,
1 Stra. 406.

cannot, by making his interest the same as that of the party who has a right to his testimony, deprive such party of the benefit of it; so neither could he, by voluntarily acquiring an interest the other way, enable himself to object to give evidence; and therefore, where a subscribing witness to a promissory note afterwards became bail for the maker, he was compelled to give evidence of the execution.*

To prove this case, he called *Wright* as a witness, who swore that he knew the state of the defendant's account, and that no money was due from the defendant to the plaintiff. Upon which *Erskine*, the plaintiff's counsel, asked him, whether some money was not due from some person to the plaintiff; and the witness demurring to this question, Lord *Knox* said, that he would not oblige him to answer any question, which might tend to charge himself with the debt. A man might come voluntarily, and charge himself with a debt, but he could not be compelled to charge himself civilly, any more than to make himself liable to a criminal prosecution.

The jury believing that *Wright* was authorised to receive this money, and that it had been paid to him, were about to find a verdict for the defendant, when the plaintiff chose to be nonsuited.

Raynes v. Towgood, K. B. Sit. at *Guildhall*, after Mich. Term, 37 Geo. 3. *M. S.* Debt on Stat. 7 Geo. 2, c. 8, against stock-jobbing. The plaintiff called *Norden*, the broker who made the contracts, to prove the fact. By the 4th sect. of the Act of Parliament, he is subjected to a penalty of 500*l.* He objected to answer any question which might tend to charge himself with the penalty. *Gibbs*, for the plaintiff, contended, that as this was not an indictable offence, but merely subjected the party to a pecuniary penalty, he could not refuse to be examined. Lord *Knox* was of opinion, he could not compel him to give evidence, which would subject him to a penalty. For want of other evidence, the plaintiff was nonsuited. The Court of King's Bench afterwards gave time to the plaintiff to proceed to trial in two other actions brought by him against other persons, until the time within which the action against the broker is to be commenced had elapsed. Vide *Raynes v. Spicer*, 7 T. Rep. 178.

* Pending the impeachment against Lord *Melville*, the doctrine contained in this chapter underwent much discussion in both Houses of Parliament, and the following questions were put to the Judges by the House of Lords, viz.

1. Whether, according to law, a witness can be required to answer a question relevant to the matter in issue, the answering which has no tendency to accuse himself, but the answering which may establish, or tend to establish, that he owes a debt recoverable by civil suit?

2. Whether, according to law, a witness can be required to answer a question relevant to the matter in issue, the answering of which would not expose him to a criminal prosecution, but might expose him to a civil suit, at the instance of his majesty, for the recovery of profits derived by him from the use or application of public money contrary to law?

3. Whether a person proffered to be examined as a witness, and who is to be discharged from debts in case he fully discloses every act, matter, transaction, and thing within his knowledge, concerning which he shall be examined, and is to remain liable to debts if he does not so disclose, is a witness whose testimony may be repelled on the ground of interest?

The Judges delivered their opinions *seriatim*, but there being much difference of opinion among them, it was thought necessary to clear up the doubts which existed

by passing a declaratory Act on the subject; and accordingly a bill was introduced into the House of Lords, which was afterwards passed into a law in the following terms:

Ch. III s. 5.
Privilege.

46 Geo. 3, c. 37.—An act to declare the law with respect to witnesses refusing to answer.

Whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit at the instance of his majesty, or of some other person or persons: Be it therefore declared and enacted, by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons.

A rated inhabitant of a parish is considered as a party to an appeal between his parish and another touching the settlement of a pauper; and being as such directly interested in the event of the appeal, cannot be compelled to give evidence by the adverse parish under the above Act of Parliament. *Rex v. Woburn*, 10 East, 395. But see the Stat. 54 Geo. 3, c. 170, ante, 157.

SECTION VI.

Of the examination of witnesses.

WHEN a witness was liable to any objection on account of interest, &c. the old rule was either to examine him upon the *voir dire*, as to his situation, or to call other witnesses to prove the fact which rendered him incompetent. (1) The party against whom he was produced had his election which of these modes he would pursue, but he could not adopt both; and if the wit-

Ch. III. s. 6.
Examination.

Vide *Abraham v. Bunn*,
Appendix.
10 Mod. 193.
Lord Lovat's
Case, 9 St.
Tr. 645-6.

(1) A witness on his *voir dire* having denied any interest in the cause, may be interrogated as to his situation, for the purpose of discovering his interest. *Roid's les. v. Dodson*, 1 Overton's Rep. 396. *Baldwin v. West*, *Hardin's Rep.* 51. *Emerson v. Andrews*, 4 Mass. Rep. 653.

The confessions of a witness in a criminal prosecution, as to his incompetency, are not admissible to disqualify himself. *Commonwealth v. Waite*, 5 Mass. Rep. 261.

Where a witness shews his interest on his *voir dire*, arising under a sealed instrument, and by parol at the same time shews it discharged, he is a good witness. *Fanning et al. v. Myers et al.* *Anth. N. P.* 47.

The examination of a witness on his *voir dire*, being upon matter collateral to the issue, is not bound down by the same strict rules which govern an examination in chief. *ibid.*—Ax. Ed.

Ch. III. s. 6. ness denied his interest, no other evidence could afterwards be produced to prove it, for the purpose of rendering him incompetent; (m) but the party was not precluded from contradicting the fact so sworn by other evidence, and thereby lessening the credit of the witness with the jury. If he appeared to be incompetent, either by his own examination on the *voire dire*, or by other evidence, the objection was immediately made; for if not taken before he was sworn in chief, it was considered as too late after he had been examined by the party calling him, and cross-examined by the other side. But the modern practice is to swear the witness in chief in the first instance; and if at any time during the trial it be discovered that he is in a situation which renders him incompetent, it is then time to take the ob-

Per Buller J.
7 T. Rep. 719.

(m) The interest of a witness cannot be proved by other testimony after he has denied it on his *voire dire*. *Berry v. Wallin et al.* 1 *Overton's Rep.* 107. *Weiden v. Buck, Anth. N. P.* 10, n. *Smallwood et al. v. Mitchell et al.* 2 *Hayw. Rep.* 145. *Ray v. Mariner et ux. ibid.* 385. *Evans v. Eaton*, 1 *Peters' Rep.* 338. *Bridge v. Wellington*, 1 *Mass. Rep.* 219. *Mallet v. Mallet*, 1 *Root's Rep.* 501. *Cot v. Bishop*, 2 *Do.* 223. *Butler v. Butler*, 3 *Day's Rep.* 214. *Dorr v. Osgood*, 2 *Tyl. Rep.* 28. *Wallace v. Child et al.* 1 *Dall. Rep.* 7. *Miffin et al. v. Bingham, ibid.* 272.

Where an offer has been made to prove a witness interested, he may still be examined on his *voire dire*, when the testimony offered has been overruled. *Main v. Newson, Anth. N. P.* 11.

When a witness is offered by one party, the *opposite* party, by other witnesses, may prove him interested, and he will thereupon be rejected. *Smallwood v. Mitchell*, 2 *Hayw. Rep.* 145.

If one party has proved by evidence *abunde*, that a witness is interested, the other cannot offer the witness's own oath to prove that he has no interest. *Vincent v. Lee of Huff*, 4 *Serg. & R. Rep.* 298.

Where the plaintiff objected to the defendant's witnesses that they were interested, and that it would appear by a written instrument in defendant's hands if he would produce it, which he refused to do; the plaintiff then proved the existence of the writing, and the Court excluded the witness; the defendant then offered the writing, but the Court refused to receive it. *Mitchelson v. Enos*, 2 *Root's Rep.* 515.

To prove that a witness was interested in the event of the cause, evidence was offered to prove that he had declared he was interested; and it was held the evidence was admissible. *Coleton v. Nichols*, 1 *Har. & Johns. Rep.* 105.

But where a witness swears upon his *voire dire*, that he does not know whether he is interested in the suit or not, his interest may be proved by other evidence. *Shannon et al. v. The Commonwealth for the use of Lazarus*, 8 *Serg. & R. Rep.* 444.

If after a witness has been sworn on his *voire dire*, it appears from his own testimony on his examination in chief that he is interested, he may be rejected. *Cole's les. v. Cole*, 1 *Har. & Johns. Rep.* 572. Et vide *Swift v. Dean*, 6 *Johns. Rep.* 523. *Baldwin v. West, Harbin's Rep.* 50.

But if it appear from the evidence of other witnesses only, it cannot be rejected. *ibid.*

A cross-examination under a rule of Court to take the deposition of a going witness, does not amount to an examination on a *voire dire*, and will not preclude the exception to his competency at the trial. *Miffin et al. v. Bingham*, 1 *Dall. Rep.* 275.—*Am. Ed.*

jection; but the bare circumstance of a witness being discovered to be incompetent after the trial, is not alone sufficient ground for a new trial; however it may, when added to others, weigh with the discretion of the Court.(n)

Ch. III. s. 6.
Examination.

Turner v.
Pearce, 1 T.
Rep. 719.

NEW TRIALS.

1. Where the verdict is against law or evidence—or where there has been a mistrial.

(n) A new trial will be granted where the verdict of the jury is against law. *Dillingham v. Snow et al.* 5 Mass. Rep. 547. *Commissioners of Berks v. Rose*, 3 Binn. Rep. 590. *Payne v. Trezevant*, 2 Bay's Rep. 23. *Munro v. Gardiner*, 1 Rep. Const. Ct. S. Car. 328. *M'Meens v. Calhoun*, 1 Nott & M'Cord's Rep. 425.

Granting of new trials depends on the legal discretion of the Court, guided by the nature and circumstances of the particular case. *Steinmiz et al. v. Curry*, 1 Dall. Rep. 244. *Bradley v. Bradley*, 4 Do. 112. *Brown v. Frost*, 2 Bay's Rep. 126. *Kimball v. Cady*, Krb. Rep. 41.

So in *New York*. *Bunn v. Hoyt*, 3 Johns. Rep. 255. *Fleming v. Gilbert*, *ibid.* 523. *Shumway v. Fowler*, 4 Do. 425. *Durves v. Dennison*, 5 Do. 248. *Dole v. Lyon*, 10 Do. 447.

So where there has been a mistrial. *Bend v. Cullar*, 7 Mass. Rep. 205.

So a new trial will be granted where the verdict is manifestly against the evidence. *Hammond v. Wadhams*, 5 Mass. Rep. 353. *Wait v. M'Neil*, 7 Do. 261. *Hoyt v. Gilman*, 8 Do. 336.

In *New York*, *Hart v. Hosack*, 1 Caines' Rep. 35.

In *South Carolina*, *Cockfield v. Daniel*, 1 Rep. Const. Ct. S. Car. 193.

Whenever it appears with reasonable certainty that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages, the Court will always grant a new trial. *Comperthwaite v. Jones et al.* 2 Dall. Rep. 56.

A new trial was awarded in a feigned issue to try the validity of a will, on the dissatisfaction of one of the two Judges who tried it. *Vanlear v. Vanlear*, 4 Yeates' Rep. 3.

But though a verdict was against the opinion of the Judge who tried the cause, yet if it depended on the credit of witnesses, a new trial will not be granted, except in extraordinary cases. *Fell v. Good et al.* 2 Binn. Rep. 495.

Though a Judge had expressed an opinion at the trial, that the party had not made out his case, yet if he does not declare his dissatisfaction with the verdict, a new trial will not be granted. *Smith et al. v. Odlin*, 4 Yeates' Rep. 468. *Ludlow v. Union Ins. Co.* 2 Serg. & R. Rep. 119.

2. Where improper evidence has been admitted at the trial.

A new trial will be granted where illegal evidence has been admitted to prove the plaintiff's declarations, although not objected to at the time by the defendant. *Bridge v. Austin*, 4 Mass. Rep. 115. *Storer v. White*, 7 Do. 448. *Vide Jones v. Fales*, 4 Do. 245. *Jones v. Alexander*, 2 Do. 36.

A second new trial was awarded after trial by a special jury, and view without costs, improper evidence, which was afterwards overruled on the trial, having been disclosed to the jury on the view. *Stewart v. Richardson*, 3 Yeates' Rep. 200.

3. Where proper evidence has been rejected by the Judge.

If legal and proper evidence be rejected by the Judge, the party aggrieved is en-

Ch. III. s. 6.
Examination.

On this examination of a witness, as to his situation, he may be asked any questions concerning instruments he has executed, &c. without producing these instruments; for the party against

titled to a new trial. *Hunt adm. v. Adams*, 7 Do, 518. Vide *Emerson v. Andrews*, 4 Do. 653.

4. *For a misdirection or omission of the Judge in summing up the cause.*

Where a jury, under the direction of the Judge, have found a verdict either against law or evidence in favour of the defendant, in cases where, on the merits, the plaintiff could recover but a small sum, the Court have refused a new trial. *Boyd v. Moore*, adm. 5 Mass. Rep. 365. Vide *Dudley v. Sumner*, *ibid.* 488. *Aylwin v. Ulmer*, 12 Do. 22. *Tyler v. Ulmer*, *ibid.* 163.

In *New York*, vide *Brantingham v. Fay*, 1 Johns. Cas. 355. *Hyatt v. Wood*, 3 Johns. Rep. 239.

But not if justice has been done. *Brazier v. Clap et al.* 5 Mass. Rep. 1. *Jones et al. v. Fales*, *ibid.* 101. *Newhall v. Hopkins*, 6 Do. 350. *Snyder v. Finley*, 1 Cox's Rep. 78.

It is gross misbehaviour for any one to speak to a jurymen, or for any one to permit a jurymen to converse with him respecting the cause, at any time after he is summoned, and before the verdict is delivered. *Blaine's les. v. Chambers*, 1 Serg. & R. Rep. 169.

It is not sufficient ground to grant a new trial, that one of the jurors, after they had agreed upon their verdict for the plaintiff, sealed it up and separated, heard a third person express his opinion that the plaintiff ought to recover. *Willing v. Sweasey*, 1 Browne's Rep. 123.

It is not sufficient cause to set aside a verdict that one of the jurors was an alien. *Hollingsworth v. Duane*, C. C. 4 Dall. Rep. 353.

5. *Where there has been misconduct of the jury—or where an objection exists against any of the jurors.*

When any gross misbehaviour or legal impropriety of conduct in a jury, in finding their verdict, shall be made to appear, such verdict ought to be set aside. *Grinnell v. Phillips*, 1 Mass. Rep. 543. Vide *Bullock v. Horsford*, 2 Root's Rep. 349.

If a juror, through mistake of his duty, agree to a verdict against his opinion, because he believes he must assent to the verdict of a major part of the jury, it is no good cause for a new trial. *Commonwealth v. Drew et al.* 4 Mass. Rep. 391.

A new trial will not be granted where it appears that a juror had betted on both sides of a cause, unless an evident bias was produced, nor where some of them have expressed an opinion on the opening of the cause. *Goodright v. M. Causland et al.* 1 Yeates' Rep. 373.

If one of the parties discover, before the verdict, that a juror, before he was impanelled, declared that he had made up his mind against him, he must lay the matter immediately before the Court. He must not take the chance of a verdict in his favour, and keep a motion for a new trial in reserve. *M. Cerkle v. Binns*, 5 Binns. Rep. 340.

6. *Where the party has come to the knowledge of new evidence.*

If a party, after the trial of a cause, come to the knowledge of facts which would have a tendency merely to discredit a material witness of the adverse party, it is no good cause for a new trial. *Commonwealth v. Drew et al.* 4 Mass. Rep. 391.

So in *New York*. *Jackson ex. d. Rowley et al. v. Kinney*, 14 Johns. Rep. 186.

whom he is called, not knowing the witnesses to be produced against him, cannot always be prepared with the evidence to prove him incompetent. Ch. III. s. 6.
Examination.

Nor if by due diligence he could have procured other material testimony. *Bond v. Cullar*, 7 Mass. Rep. 205. Et vide *De Lima v. Glassell*, 4 Hen. & Munf. Rep. 369.

In *New York* it has been decided that it ought to appear—1st. That the evidence has been discovered since the last trial. 2nd. That no laches is imputable to the party; and 3d. That the testimony is material. *Vandervoort v. Smith*, 2 Caines' Rep. 155. *Hollingsworth v. Napier*, 3 Do. 183. *Palmer v. Mulligan*, *ibid.* 307.

In *Pennsylvania*, vide *Moore v. Philadelphia Bank*, 5 Serg. & R. Rep. 41.

The Court will decide on the materiality of the evidence, and grant the motion or not, accordingly. *Halsey v. Watson*, 1 Caines' Rep. 24. *Kendrick v. Delafield*, 2 Do. 67.

Evidence to impeach testimony given on a former trial, is not material evidence, and a new trial will not be granted in order to admit it. *Halsey v. Watson*, 1 Caines' Rep. 24. *S. P. Shumway v. Fowler*, 4 Johns. Rep. 425. *S. P.* Especially if the witness is dead. *Duryee v. Demulson*, 5 Johns. Rep. 248. *S. P. Brown v. Hoyt*, 3 Do. 255.

It will not be granted to admit the testimony of another witness to the same fact. *Steinbach v. Col. Ins. Co.* 2 Caines' Rep. 129. *Smith v. Brush*, 8 Johns. Rep. 84.

In slander, for charging plaintiff with felony, a new trial will not be granted to let in newly discovered evidence in support of a plea of justification. *Bare v. Root*, 9 Johns. Rep. 264.

Aliter, if the new evidence goes only to the plea of not guilty. *ibid.*

On a motion for a new trial, on an affidavit of newly discovered evidence from A. B. a man of good character and reputation, the opposite party may read affidavits to question his credibility. *Pomroy v. Col. Ins. Co.* 2 Caines' Rep. 260.

The discovery of oral testimony, after trial, is not a ground for granting a new trial. *Esfert v. Des Coudres*, 1 Rep. Const. Ct. S. Car. 69. *Exrs. of Evans v. Rogers*, 2 Nott & Mc Cord's Rep. 563.

The discovery of evidence of which the defendant was not apprised, but consisting of written evidence among the papers of his testator, no ground for a new trial. *Bogart et al. v. Exrs. of Simons*, 1 Rep. Const. Ct. S. Car. 143.

In *New Jersey*, vide *Deacon v. Allen*, 1 South, Rep. 338.

And such newly discovered evidence must be important, and shew that injustice has been done. *Jessup v. Cook*, 1 Halst. Rep. 434.

7. Where the judgment is erroneous—or where the verdict ought to have been set aside.

A review will not be granted where it appears to the Court, on an inspection of the record, that the judgment complained of would be reversed on writ of error. *Hart v. Huckins*, 5 Mass. Rep. 260.

A new trial will be granted for the purpose of correcting a mistake in a judgment occasioned by the miscalculations of the interest on a promissory note. *Isley adm. v. Knight*, 1 Mass. Rep. 467. *Whitwell v. Atkinson*, 6 Do. 272.

So for the mistake in the value of foreign money. *Betts v. Death*, Addis. Rep. 267.

A new trial will be granted where it appears that the verdict ought to have been set aside. *Pease v. Whitney et al.* 4 Mass. Rep. 507.

A new trial will be granted where the verdict is for the defendant, against law

Ch. III. s. 6.
Examination.

Botham v.
Swingler,
Peake's Cas.
218. Esp. 164,
S. C.
Vide etiam
Rex v. Gis-
burn, 15 East,
57.

So if a witness on examination confess that he was originally interested, he may restore his competency by proving that he has been since a bankrupt, and received his certificate, or any

and the directions of the Court. *Les. of Ross et al. v. Eason et al.* 1 Yeates' Rep. 14. *Emmet v. Robinson*, 2 Do. 514.

Where three actions against the same defendant were tried by the same jury, and the plaintiff in one of the actions, gave evidence applicable to a case in which he was not a party, but which tended to swell the damages in his own case, the Court granted a new trial in all of them. *Consequa v. Wilking et al.* 1 Peters' Rep. 225.

So where there is reason to believe justice has not been done, and the verdict is against the weight of evidence. *Jackson ex. d. Le Roy v. Steinberg*, 1 Caines' Rep. 167. *Mumford v. Smith*, *ibid.* 590.

8. Where substantial justice has been done.

A new trial will not be granted where substantial justice has been done by the verdict. *Cogswell v. Brown*, 1 Mass. Rep. 237. *Garish v. Bearce et al.* 11 Do. 193. In New York. *Depryster v. Col. Ins. Co.* 2 Caines' Rep. 129. *Smith v. Elder*, 3 Johns. Rep. 105.

A new trial is an appeal to the legal discretion of the Court, and unless injustice has been done, should not be granted. *Jordan v. Meredith*, 3 Yeates' Rep. 318. *Commonwealth v. Eberle*, 3 Serg. & R. Rep. 9.

If justice has been done, the Court will not set the verdict aside on account of the form of the action. *Boden v. Elks*, 7 Mass. Rep. 507.

So in Connecticut. *Miller v. Talcott*, 2 Root's Rep. 115.

So in Pennsylvania. *Ralston v. Cummins*, 2 Yeates' Rep. 436. *Miller v. White*, Tyl. Rep. 312. *Tager v. Hill*, 1 Rep. Ct. of Const. 164. *Billers v. Bogan*, 1 Bayn. Rep. 13.

And in North Carolina. *Allen v. Jordan*, 2 Do. 132.

The Court will not set a nonsuit aside, where it appears that the verdict in favour of the plaintiff would be against the evidence produced at the trial, if it do not appear that other evidence exists. *Hoyt v. Gilman*, 8 Mass. Rep. 336.

In Vermont, a new trial will not be readily granted, where a new action is not barred by the Statute, because the jury have not pursued the directions of the Judge. *Smith v. Hubbard*, 1 Tyl. Rep. 142.

By Stat. In that State, the Courts are restricted from granting new trials, except where questions of law are mistaken by the jury in the charge of the Court; and on a motion for a new trial, because the verdict is against law and the direction of the Court, if it appears there were matters of fact as well as of law under the consideration of the jury, and if the jury had found the facts one way, they had applied the law correctly, the Court will not consider the motives of the jury, but will presume the verdict correct. *ibid.*

If a juror disclose by intimation the event of the verdict, before it is given in Court, it is good ground for a new trial. *Orcutt v. Carpenter*, *ibid.* 250.

Et vide in Connecticut, *Tweedy v. Brush*, *Kirb. Rep.* 13. *Dana v. Roberts*, 1 Root's Rep. 134. *Bow v. Parsons*, *ibid.* 429.

A new trial will not be granted for the recent discovery of material evidence, supported by the single affidavit of the party in interest. The motion must be accompanied with the affidavits of the witnesses recently discovered. *Webber v. Foes*, *ibid.* 443.

In Connecticut, it will not be granted, if the evidence might have been produced at the former trial. *Noyce v. Huntington*, *Kirb. Rep.* 282. Et vide *Scott v. The State*, 1 Root's Rep. 155. *The State v. Lockair*, 2 Do. 84.

other fact whereby his interest is determined. But had his interest been proved by other evidence, his certificate should have been produced; and if a release be given by or to the witness,

Ch. III. s. 6.
Examination.

An objection to a juror, which will not be the cause for a principal challenge, will not be sufficient cause for a new trial. *Chapman v. Wells*, *Kirb. Rep.* 133.

If an alien be drawn and impannelled as a juror, it is a good cause of challenge but not of a new trial after a conviction. *The State v. Quarrell*, 2 *Bay's Rep.* 150. *Hollingsworth v. Duane*, 4 *Dall. Rep.* 354.

If the jury refer the decision of their cause to chance, it is a good cause of arrest of judgment. *Warner v. Robinson*, *Kirb. Rep.* 194.

9. For excessiveness of damages.

The Court possess the power to grant new trials for excessive damages in cases of torts; but there is no precedent for a new trial in crim. con. *Shoemaker v. Livesly*, 3 *Browne's Rep.* 286.

But the case must be a rank one, to induce the Court to set aside a verdict, in an action for a tort, on account of the excessiveness of the damages. *Sommer v. Will*, 4 *Serg. & R. Rep.* 27.

The Court will not grant a new trial because the jury have exceeded legal interest in the measure of damages, for delaying payment of money, unless it be excessive. *Respublica v. Lecase et al.* 2 *Dall. Rep.* 118. *S. C.* 1 *Yeates' Rep.* 155.

It is not correct to say a new trial will never be granted where the jury find only nominal damages. *Shenck v. Monday*, 2 *Browne's Rep.* 106.

A new trial cannot be granted in a *qui tam* action, as to the civil part, without the other. *Hannaball v. Spalding*, 1 *Root's Rep.* 86.

It was granted in the case of a libel in the admiralty of a vessel, where the acquittal was produced by fraud and imposition. *Pruden v. Northrop*, 1 *Root's Rep.* 93.

It is a good cause of arrest that one of the jurors were interested in the same question. *Talmadge v. Northrop*, 1 *Root's Rep.* 454.

Where gross injustice has been done, a new trial will be granted to the plaintiff in a *qui tam* action. *Hilliard v. Nichols*, 2 *Root's Rep.* 176.

Where there was contradictory evidence, whether a sale of a chattel was absolute or not, the Court refused to set aside a verdict. *De Fenclear v. Shottenkirk*, 3 *Johns. Rep.* 170.

In penal actions, and in those for libel and defamation, and others vindictive in their nature, a new trial will not be granted, because a verdict for the defendant was against the weight of evidence, unless some rule of law has been violated, or there has been tampering with the jury. *Jarvis v. Hatheway*, 3 *Johns. Rep.* 180. *Hurtin v. Hopkins*, 9 *Do.* 36. Et vide *Felter v. Whipple*, 8 *Do.* 369. *Steel v. Roache* 1 *Bay's Rep.* 63.

In actions for slander, libels, and other personal torts, a new trial will not be granted on the ground of excessive damages, unless they are so flagrantly outrageous and unjust, as manifestly to shew that the jury must have been actuated by prejudice, partiality, passion, or corruption. *Coleman v. Southwick*, 9 *Johns. Rep.* 45. *Southwick v. Stevens*, 10 *Do.* 443. *Neal v. Lewis*, 2 *Bay's Rep.* 904. *Chancellor v. Vaughn*, *ibid.* 416. *Mathews v. West*, 2 *Not & M Cord's Rep.* 415. *Ogden v. Gibbens*, 2 *South. Rep.* 518. *Taylor v. Elger*, *Hardin's Rep.* 586.

Nor in crim. con. *Torre v. Summer*, 2 *Not & M Cord's Rep.* 267. *Deacon v. Allen*, 1 *South. Rep.* 338. *Shoemaker v. Livesly*, 3 *Browne's Rep.* 286.

The damages on a quantum meruit, or valebant, must be flagrantly excessive to induce the Court to grant a new trial. *Long v. Perry*, *Hardin's Rep.* 317.

Ch. III. s. 6. for the express purpose of rendering him competent, it should be produced, and the subscribing witness called to prove it.(o)
 Examination.

When a witness is not liable to any legal objection, he is first examined by the counsel for the party on whose behalf he comes to give evidence, as to his knowledge of the fact he is to prove.(p) This examination, in cases of any intricacy, is a duty

The importance and novelty of the case, are sufficient reasons for granting a new trial. *Abbot v. Sebor*, 3 Johns. Cas. 39.

A verdict being recovered on a note given for money won at cards, a new trial was granted. *Tidmore et al. v. Boyce et al.* 2 Rep. Const. Ct. S. Car. 200.

A new trial was granted when the plaintiff was surprised at the trial, by an allegation of a payment, sworn to by two witnesses, whom there was reason to suspect of perjury. *Peterson v. Barry*, 4 Binn. Rep. 481. Et vide *Arrington v. Coleman*, 2 Hayw. Rep. 300.

If the plaintiff examine his witness and deliver him over to the defendant to cross-examine, and before any opportunity offer to enable the plaintiff to ask him any question in explanation, the witness fell down in a fit, and the plaintiff went on to examine other witnesses and try the cause, the Court will not afterwards grant a new trial, to give the plaintiff an opportunity of letting in further testimony of the same witness. *Depryster v. The Col. Ins. Co.* 2 Caines' Rep. 85.

It must be a very extraordinary case to induce the Court to grant a new trial, after two concurring verdicts on matters of fact. *Burkart v. Bucher*, 2 Minn. Rep. 467. *Kebble v. Arthurs*, 3 Do. 26. *Peay v. Briggs*, 2 Nott & M'Cord's Rep. 184.

After three verdicts a Court of Chancery will decree in accordance with the opinions of the juries. *Stannard v. Graves et al. exrs.* 2 Call's Rep. 369. Et vide *McRea v. Wood*, 1 Hen. & Munf. Rep. 548.

10. In criminal cases.

A new trial may be awarded by the Oyer and Terminer. *The People v. Townsend*, 1 Johns. Cas. 104.

But not by the Sessions, except for irregularity. *Ibid v. The Justices of Chenango*, 1 Johns. Cas. 179.

Where a juror has been withdrawn by the order of the Court, the defendant is not to be discharged, but is to be tried anew. *The People v. Denton*, 2 Johns. Cas. 275. *Ibid v. Olcott*, *ibid.* 301.

Where justice has been done by a verdict, there ought to be no new trial, even in a criminal case, although there may have been a misdirection of the Judge in an unimportant particular. *The State v. Wells*, 1 Coxe's Rep. 424.

A new trial will be granted in a criminal case, where one of the jurors had expressed an opinion before the trial, unfavourable to the prisoner. *The U. States v. Fries*, 3 Dall. Rep. 515. *The State v. Hopkins*, 1 Bay's Rep. 373.

What evidence is admissible on a motion for a new trial, vide ante, p. 257, n (2)

Where a grand juror, who finds an indictment at one Court, is drawn to serve as a juror at another, and the defendant does not challenge or except to him before he is sworn, it is too late to move for a new trial on that account after a trial and conviction. *The State v. O'Driscoll*, 2 Bay's Rep. 153.—Am. Ed.

(o) An objection to the competency of a witness, is made in sufficient time, if made during the trial, if he should eventually appear to be interested. *Bank of North America v. Wickeff*, 2 Yeates' Rep. 39. S. C. 4 Dall. Rep. 151.—Am. Ed.

(p) Where the testimony of a Swede, wholly ignorant of the English language, was wanted by a grand jury, the Court ordered an interpreter to be first sworn,

of no small importance in the counsel; for, as on the one hand the law will not permit him to put what are called leading questions, viz. to form them in such a way as would instruct the witness in the answers he is to give; so on the other, he should be careful that he makes himself sufficiently understood by the witness, who may otherwise omit some material circumstance of the case. Of late years, the rule as to leading questions has been somewhat relaxed in the case of an original examination; and where it evidently appeared that a witness was hostile to the party by whom he was called, and unwilling to answer questions put to him, the examination in chief has been permitted to assume the appearance of a cross-examination, and leading questions to be put to a witness. It is impossible to point out the cases in which the general rule of law shall be so departed from; and therefore it must be left wholly to the discretion of the Judge, who, in general is guided by the demeanour of the witness, and the situation he stands in with relation to the parties.

The counsel retained on the other side, next cross-examines the witness; (g) and the witness not being supposed so friendly to his client as to the party by whom he is called, he is not restrained to any particular mode of examination, but may put what questions he pleases. He may, for the purpose of trying the credit of the witness, suppose facts *apparently connected with the cause*, which have no existence but in his own imagination, and ask the witness if they did not happen. No mischief can arise from this course of examination; for, if the witness is determined to speak nothing but the truth, he will deny every thing so suggested, and the testimony of every other who is called will confirm him. But it frequently happens, on the other hand, that witnesses who have entered into a wicked conspiracy

truly to interpret between the Court and jury and the witness. The oath was then administered to the witness in *English*, and interpreted to him by the sworn interpreter, as it was pronounced by the clerk. *Norberg's Case*, 4 *Mass. Rep.* 81. *Armory v. Fallowes*, 5 *Do.* 219.

Under a commission for the examination of *French* witnesses, who could not speak *English*, the depositions are not to be taken in *French*, but must be turned by the interpreter into *English*, and be so taken down and returned. *Lord Viscount Belmore v. Anderson*, 2 *Cecce's Ch. Cas.* 288.—*AM. ED.*

(g) The defendant on a trial for perjury was held entitled to cross-examine a witness, though called only to produce a document, and not asked any questions on the part of the prosecution. *Rex v. Brooks*, 2 *Starkie's Rep.* 472.

No testimony can be admitted on a cross-examination, but what would have been legal on a direct examination. *Jackson ex. d. Van Slyck v. Son, Col. & Caines' Cas.* 329.—*AM. ED.*

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to defeat justice, and who, having made up their story together, agree upon the general features of the case, will, when examined out of the hearing of each other,* by their variations in little circumstances, as to which they are unprepared, betray the villainy of their attempt; and by their contradictions be rendered utterly unworthy of credit. A cross-examination to this extent has never been objected to; but how far a counsel may, on cross-examination, inquire into matters *foreign to the cause*, for the purpose of affecting the character and credit of the witness, has, as I have before observed, been the subject of much difference of opinion, and appears to be even at present not very well settled.(r)

It must frequently occur, that in the cross-examination of a witness as to the representations by him contrary to what he deposed in chief, the counsel will have occasion to refer to letters or other written papers of the witness himself; and objections have frequently arisen at *Nisi Prius* as to the mode in which such contradictions shall be put to the witness, or given in evidence against him. In the proceedings on the Bill of Pains and Penalties against the Queen, (*Friday, Sept. 1st. 1820,*) this question was more formally discussed and decided than on any former occasion; and as such decision must be considered as a rule for all future cases, it will not be out of place to state the case fully here.(s)

* It appears that the present practice of ordering witnesses out of Court during the progress of a cause, so as to prevent them from hearing the testimony of others, is very ancient. *Fortescue de Laudibus*, c. 26, says. "Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unus non docebit aut conceitabit eorum alium ad consimiliter testificandum." See also *Williams v. Hulse*, 1 Sid. 131.

(r) When a party cross-examines a witness, he thereby makes him his own, and cannot introduce through him any proof which would not have been legal had he originally produced him, as *parol* proof of a writing without notice having been given to produce it. *Jackson ex. d. Van Slyck et al. v. Son*, 2 Caines' Rep. 178.

The English Courts consider a witness called by the plaintiff as his witness, even after a cross examination is finished, and when he is called back by the defendant. *Dickinson v. Shee*, 4 Esp. Rep. 67.

Where the teller, or clerk of a bank, is called as a witness for the party, to prove the correctness of his entry, he may be asked on his cross-examination, whether he was not in the habit of making mistakes, as such teller. *Mechanics & Farmers Bank of Albany v. Smith*, 19 Johns. Rep. 115.

A witness cannot be asked a collateral question, not relevant to the matter in issue, barely to test his credibility. *Odiorne v. Winkley*, 2 Gallis. Rep. 51.—AM. ED.

(s) The evidence stated in a case, made on a former trial, cannot be admitted to impeach the testimony of the same witness, given on a second trial of the same cause. *Neilsen et al. v. Columb. Ins. Co.* 1 Johns. Rep. 301.

The letters of a witness or an endorsement made by him on a note, may be produced to contradict his testimony. *Baker v. Arnold*, 3 Caines' Rep. 279.—AM. ED.

Louisa Dumont having been examined as to certain facts, Mr. *Williams*, in his cross-examination, asked her whether she did not use certain expressions which he read from a supposed letter from the witness to her sister; on which the Attorney-General objected, that as the questions were drawn from a written source, the letter ought to be put in before making use of its contents; and the point having been argued at length by the counsel, the Lord Chancellor moved that a question should be proposed to the Judges for their opinion, "whether in the Courts below a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having shewn to the witness the letter, and having asked him if he wrote such letter and his admitting that he wrote it?" and after some debate, that question was proposed, with the following addition, "and whether, when a letter is produced in the Courts below, the Court will allow a witness to be asked, upon shewing the witness a part of, or only one or more lines of such letter, and not the whole, whether he wrote such part, or such one or more lines, and in case the witness shall not admit that he did write the same, the witness can be examined as to the contents of such letter?" The Judges having retired for a short time, returned to the house, and the Lord Chief Justice of the King's Bench answered, that to the first question on which they were called on to speak, they answered in the negative; and stated, that the grounds on which they had so decided were, that according to the established rules of evidence, the contents of every written paper must be proved by the paper itself; therefore the witness must first be asked, whether the paper be in his handwriting? and then the paper would, if the witness admitted it, be put in to be read as evidence by the cross-examining counsel in his proper season, and the Court would be in possession of the whole.

The next question, (*viz.*) "whether the counsel would be allowed to ask a witness whether a part or the whole, or one or more lines, were in the witness's hand-writing, and whether, if the witness denied the hand writing, the counsel could proceed to cross-examine him as to the contents of the letter without shewing the whole?" The Chief Justice said, that the Judges had divided into two parts, and given a distinct answer to each of its parts. To the first part, whether counsel would be allowed to shew any part of a letter, or one or more lines,

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and to ask the witness whether that were the witness's handwriting, they had given their opinion in the affirmative; but to the latter part of the question, viz. whether, if the witness denied such part or parts to be his hand writing, counsel might proceed to examine the witness as to the contents of the letter without shewing him the whole, they were of opinion that he could not, because, as he had before stated, to prove the contents of a paper, the paper itself must be produced.

After some observations, the Lord Chancellor informed the counsel, that their Lordships had decided that they could not be allowed, on merely stating the contents of a letter, to ask the witness whether she had ever written or sent such a letter; and further, that they would be allowed to shew the witness any part or parts of a letter, and to ask if such parts were in the witness's handwriting, but they could not be allowed to examine the witness upon the contents of such letter unless the whole were shewn to the witness to ascertain the hand-writing. Upon this, Mr. *Williams* shewed the witness several letters, which she admitted to be of her hand writing; and he was proceeding to put a question respecting the contents of these letters, when the Attorney General objected to such questions, unless the letters were put in. This point was argued at length by the respective counsel, after which the Lord Chancellor proposed that the following question should be submitted to the Judges, viz. "whether, when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness would be examined in the Courts below, whether he did or did not in such letter make statements such as the counsel shall by questions, addressed to the witness, suggest are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein, and in what stage of the proceedings, according to the practice of the Courts below, the letter could be required by the counsel to be read, or be permitted by the Courts below to be read?"

This question was accordingly submitted to the Judges, and in about ten minutes the Lord Chief Justice of the King's Bench returned the answer of the Judges to the first part of the question, that the question propounded by the counsel could not be a question addressed to the witness as to the inquiry whether or no certain statements are contained in the letter, but that the letter itself must be read to manifest that such state-

ments are or are not contained in the letter. His Lordship said, that in giving that opinion the Judges did not consider that they were presuming to offer to their Lordships any new rule of evidence now for the first time given by them, but that they founded their opinion upon what was a rule of evidence as old as any part of the common law of *England*, namely, that the contents of a written instrument, if in existence, must be proved by the instrument itself, and not by parol evidence. In answer to the latter part of their Lordships question, in what stage of the proceeding, according to the practice of the Courts below, such letter could be required by the counsel to be read, or be permitted by the Courts below to be read, the Judges were of opinion, according to the ordinary rule of proceeding in the Courts below, the letters were to be read as the evidence of the cross-examining counsel, as part of his evidence, in his turn, after he should have opened his case; but if the counsel cross-examining suggested to the Court that he wished to have it read immediately, in order that he might, after the contents of the letter should have been made known to the Court, found certain questions upon it, to be propounded to the witness, which could not well or effectually be done without first reading the letter itself, that becomes an excepted case in the Courts below, and for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of considering such letter as part of his evidence.

On a subsequent day, (*Friday, Sept. 5th.*) a witness of the name of *Sacchi* being under cross-examination, was asked if he ever represented to any person that "he taxed himself with ingratitude to a most generous mistress?" (meaning the Queen) upon which the Attorney-General objected, that if the representation were made by the witness in writing, the paper ought to be put in before the question was put to the witness; but if it was only a representation made by the witness in conversation, there could be no objection to the Queen's counsel asking, Did you represent so and so in conversation? This point having been argued,

The Lord Chancellor said, that the opinion given by the Judges on a former occasion, was not exactly a decision upon the case before the house. That was a decision upon a case where written papers were produced. Here there was as yet no paper produced. If the witness could be sure that the pa-

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pers about which he was asked were existing, it would be competent for the counsel to call for their production. He could not say that it was so in a case where there might be a knowledge of papers which had existed, but for aught the Court knew, were not existing at the time of the inquiry. He proposed that it should be submitted to the Judges, for their opinion, "whether or not a witness could be cross-examined in the lower Courts as to representations of a particular nature, it not being specified in the question whether it referred to representations in writing or in words, supposing that the counsel on the other side objected to such cross-examination?" The Judges having retired to deliberate, afterwards returned to the house, and the Lord Chief Justice of the King's Bench delivered their opinion. He said it was not in the recollection of any of the Judges that a question of the nature proposed by the counsel had ever been put in the Courts below: but that questions of a similar nature were of every-day occurrence. In questions referring to contracts and agreements, the witness was frequently asked if there was any agreement for the sale of a particular article: on which it was the ordinary practice for the counsel to put an intermediate question to the witness, and ask whether the agreement was in writing. If the answer of the witness was in the affirmative, then the agreement in writing must be put in; if in the negative, the counsel might proceed to question the witness on the nature of the agreement. Although, therefore, himself and his learned brothers could not speak distinctly in the affirmative or the negative upon the question proposed to them by their Lordships, yet, with reference to the principles of the law of evidence, as decided by practice relative to contracts and agreements, the other Judges, with himself, were decidedly of opinion that the question could not be put in its present form? but it might be divided, and the witness might be first asked generally if he had made any declarations or representations, and if he answered in the affirmative, he might be asked the particulars of those representations, the counsel on the other side being permitted by the house to interpose the question whether the declaration was in writing.

The Lord Chancellor said, he always understood the rule to be as given by the Judges; and, on the counsel being called in, informed them, that the house had decided, the counsel cross-examining must first ask if the declaration of the witness was made orally or in writing, and, after some observations from Lords GAY and ERSKINE, added that he thought the best course,

would be for the counsel for her Majesty to be asked if he would ask the witness if he had made a representation, with the understanding that the counsel for the bill was to be allowed to ask the witness, before that question was answered, if he had made the representation in writing.

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Having thus noticed the course of examination which is permitted for the purpose of affecting the credit of a witness as to declarations or representations made by him respecting the subject of the cause, it will be proper to remind the reader that such examination is absolutely necessary, to enable the party against whom he is called to shew the fact alleged against him; for though the party is not bound, as we have seen in other cases not connected with the cause, (*ante*, 269,) to take the story of the witness exactly as he chooses to give it, yet he is not permitted to inquire from other witnesses as to the fact alleged without first examining the witness to it.

Though this has long been the established course of proceeding in *Westminster-Hall*, yet it was questioned in the House of Lords, on the bill against the Queen, (*Friday, Oct. 20th*;) and an attempt having been made to discredit the above mentioned witness (*Sacchi*) by shewing that he had attempted to suborn other persons to give false testimony against the Queen, the following questions were put to the Judges, viz. "1st. Whether according to the practice and usage of the Courts below, and according to law, when a witness in support of the prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him to procure persons corruptly to give evidence in support of the prosecution, it would be competent to the party accused to examine the witnesses in his defence to prove such declarations or acts without first calling back such witness examined in chief to be examined or cross-examined as to the fact whether he never made such declarations, or did such acts?"

"2d. Whether, if on any trial in any Court below a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant in such cause, and if after the cross-examination of such witness by the defendant's counsel, they discover that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony in such cause, the counsel for such defendant may not be permitted to give evidence of such corrupt act of such witness without calling back such witness?"

The Chief Justice, in answer to these questions observed,

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that the usual practice of the Courts below, and a practice to which they were not aware of any exception, was this: If it be intended to bring the credit of any witness into question by proof of any thing that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation or exculpation of his conduct, if any there be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the Court at once, which in our opinion is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterwards of contending that the matter of the speech or declaration is such that he is not to be bound by the answer of the witness, but may contradict and falsify it; and if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as he had before alluded to; and it was, his Lordship added, in their opinion, of great importance that that opportunity should be afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it might be wholly lost; for a witness who had been examined, and had no reason to suppose that his further attendance was requisite, often departed the Court, and might not be found or brought back until the trial had ended. So that if evidence of this sort could be adduced on the sudden, and by surprise, without any previous intimation to the witness, or the party producing him, great injustice might be done, and, in their opinion, not unfrequently would be done, both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects of the course of proceeding established by their Courts

was, the prevention of surprise, as far as was practicable, upon any person who might appear therein.”

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“The questions propounded by their Lordships comprised not only delarations made by a witness, but also, in the language of the first of those questions, “acts done by him to procure persons corruptly to give evidence in support of the prosecution;” and, in the language of the latter questions, “a discovery that the witness has corrupted or endeavoured to corrupt another person to give false testimony in such cause”

“They understood the acts thus mentioned to be acts occurring in the ordinary mode and usual course wherein such transactions were proved in common experience to take place; because, they presumed, if the questions had related to an act done in an extraordinary and unusual manner, their attention would have been directed to the special mode and circumstances of the act by the frame and language of the questions. Now such acts of corruption were ordinarily accomplished by words and speeches, an offer of money or other benefit derives its entire character from the purpose for which it was made, and this purpose was notified and explained by words, so that an inquiry into the act of corruption would usually be, both in form and effect, an inquiry into the words spoken by the supposed corruptor; and words spoken for such a purpose did, in their opinion, fall within the same rule and principle, with regard to the proceedings in their Courts, as words spoken for any other purpose, and they did not therefore perceive any solid distinction with regard to this point, between the declarations and the acts mentioned in the questions proposed to them.”

When a witness has been cross-examined by the counsel of the party against whom he has been called, the counsel who originally called him is permitted to re-examine him, for the purpose of explaining any facts so brought out on cross-examination; but in doing this, he cannot ask leading questions more than on his original examination; and if, on cross-examination as to a conversation had by him with a third person, respecting his being a witness in the cause, he mentions what he said to such third person, this does not entitle the counsel by whom he is called to inquire into the whole conversation between him and such third person, so as to let in the assertion of such third person,* but only what induced the witness to make such communication. (†)

Re-examination.

* By eight Judges, BARR J. dissent. in the *Queen's Case*, Tuesday, Sept.

(†) A party producing a witness may be allowed to correct any mistake which the witness may have made. *Steinbach v. Col. Ins. Co.* 3 Caines' Rep. 129.

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Aid of the
witnesses me-
mory.

The party examined must, as was before observed, depose to those facts only of which he has an immediate knowledge and recollection. He may refresh his memory with a copy taken by himself from a day-book, and if he can then speak positively as to his recollection, it is sufficient; but, if he has no recollection, further than finding the entry in his book, the book itself must be produced. (1) Where the defendant had signed acknowledgments of having received money, in a day-book of the plaintiff, and the plaintiff's clerk afterwards read over the items to him, and he acknowledged they were all right, it was held that the witness might refresh his memory by referring to the book, although there was no stamp to the items on which the receipt was written; for this was only proving a verbal acknowledgment, and not a written receipt. (2) (u)

(1) *Tanner v. Taylor*, cited 3 T. Rep. 754.

(2) *Jacob v. Lindsay*, 1 East, 467.

His opinion
in matters of
science.

Though witnesses can in general speak only as to *facts*, yet in questions of science, persons versed in the subject, may deliver their *opinions* upon oath, on the case proved by the other witnesses. Thus a physician who has not seen a particular patient, may, after hearing the evidence of others, be called to prove on his oath, the general effects of the disease described by

It seems that material testimony ought not to be rejected merely because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the adverse party would be deceived or injured by it. *Richardson v. Stewart*, 4 Binn. Rep. 198.

After a witness has been examined and cross-examined, the Court may, at *their discretion*, permit either party to examine him again, even as to new matter, at any time during the trial. *Curren v. Connery*, 5 Binn. Rep. 489.

Where by an accidental omission, plaintiff's attorney does not call and examine a witness who was present in Court, and a nonsuit is moved for after he has rested his case, the Court will permit the witness to be examined in furtherance of justice. *Campbell et al. v. Ingraham*, 1 Rep. Const. Ct. S. Car. 293.

After the defendant has closed his testimony, the plaintiff will not be permitted to give additional evidence on a subject on which he had previously examined witnesses, if nothing new in relation to it has been proved by the defendant. *Gilpins v. Consequa*, 1 Peters' Rep. 85.—Am. Ed.

(u) *Steinback v. Col. Ins. Co. & Cairnes' Rep.* 129.

Where a person who is a witness to a particular transaction, has made a memorandum at the time of certain facts, for the purpose of perpetuating the memory of them, and can at any subsequent period swear that he had made the entry at that time for that purpose, and that he knows from that memorandum that the facts did exist, it will be good evidence, although the witness does not retain a distinct recollection of the facts themselves. *State v. Rawls*, 2 Nott & Mc Cord's Rep. 539.

So where on an indictment for gaming, the prosecutor was unable to testify to particular facts, except from seeing them in an affidavit made by himself, at the time he had seen the offence committed, the evidence was held admissible. *ibid.*—Am. Ed.

them, and its probable consequences in the particular case. So Ch. III. s. 6. a ship-builder has been permitted to give his opinion on the sea-^{His opinion in matters of science.} worthiness of a ship from a survey taken by others ;(1) an engineer to prove, from his own experiments, the usual effects of natural causes on a particular harbour ; seal engravers, to shew^{(1) Thornton v. Royal Exch. Assur. Peak. N. P. C. 25. Chad. and v. Angustien, Ibid. 43.} that an impression was from a forged seal ;(2) and, persons accustomed to inspect hand-writings, to prove that a particular document appeared to be an imitation, and not a genuine hand writing ;(3) for though the evidence so given does not distinctly prove the fact, it is still general information, which the rest of mankind stand in need of, to enable them to form an accurate judgment on the subject in dispute.^{(2) Folkes v. Chad, cited 4 T. Rep. 408.}

(3) Ante, 157.

SECTION VII.

Of procuring the attendance of witnesses, and their privilege from arrest.

To enable a man to produce his witnesses before a jury in cases where they will not voluntarily appear on his behalf, the law has provided a compulsory remedy by the writ of *subpoena*.^(x) The names of four witnesses may be put in this writ, and if the person whose testimony is required be in possession of any deed or writing, the production of which is necessary for the party, a special clause may be inserted in the writ commanding him to bring it with him (whence the writ is denominated a *subpoena duces tecum*.) or a notice to produce the instrument may be given to the witness at the time of serving the *subpoena*. Under this writ, however, the party cannot compel a third person to produce any paper which constitutes a part of his title, or, as was said in one case⁽¹⁾ before the stat. 46 Geo. 3, which

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Procuring their attendance.

(1) Miles v. Dawson, 1 Esp. Cas. 405. See vide ante, 140, sect. 4.

(x) Where a witness refuses to obey a *subpoena*, which has been regularly served upon him, the Court will grant an attachment against him in the first instance. *Andrews v. Andrews*, 2 Johns. Cas. 109. Et vide *United States v. Caldwell*, 2 Dall. Rep. 334.

But a witness may by his own act dispense with the legal form of serving a *subpoena*, and may under such service be subjected to an attachment. *Feres v. Strome et al.* 1 Yeates' Rep. 303.

Witnesses are bound to appear and give evidence of circumstances in extenuation of a sentence as well as before a jury. *The State v. Smith*, 2 Bay's Rep. 62.—Am. Ed.

Ch. III. s. 7.
Punishment
for not at-
tending.

(1) *Amey v. Long* 9 East, 473.

(2) *Pearson v. Iles*, Dougl. 556.

(3) *Bland v. Swafford*, Peck, N. P. C. 60.

Remuneration.

(4) *Barrow v. Humphrey*, 3 B. & A. 600.

(5) *Hammond v. Stewart*, 1 Sra. 510.

(6) *Chapman v. Pointon*, 2 Stra. 1150.

would expose him to an action ; but the Court, and not the witness, is to determine what papers he is compellable to produce.(1)(y) The service of the writ of *subpœna* is made by delivering a copy to the witness, and shewing him the original, at the same time tendering a reasonable sum of money for his expenses according to his station in life ; and if, after this, he neglect to attend, he will be liable either to an attachment, to an action at the common law for damages, or to an action on the Statute of 5 *Eliz. c. 9*, for the penalty of ten pounds, and the further recompense given by that Statute, at the election of the party injured by his negligence:(2) but, by the express provision of the Statute, thus further recompense is left to the discretion of the Judge of the Court out of which the process issues, and therefore cannot be assessed by the Judge or jury at *Nisi Prius*.(x)

In one case Lord KENYON ruled, that the party who was plaintiff in the original cause could maintain no action against the witness unless he suffered the cause to be called on and was nonsuited;(3) but the Court of King's Bench have expressed a doubt of the propriety of this decision.(4)

Courts of Justice take care of the interests of the witness at the same time that they are attentive to those of the suitor ; and therefore, unless the *subpœna* be served a reasonable time before the day of trial, so as to enable a witness to arrange his affairs;(5) and, in civil cases, unless a sufficient sum of money be tendered to the witness, to enable him to go to, stay at, and return from, the place of trial,(6) he will not be liable to punishment for neglecting to attend. But though entitled to his reasonable expenses, yet, except in the case of medical men and

(y) Vide ante, p. 138.

(z) An attachment will not lie against the printer of a newspaper for not producing papers, containing the advertisements of county commissioners under a *subpœna Juces tecum*. *Lee of Shippen v. Wells*, 2 *Yeates' Rep.* 260.

Quere, Have the Common Pleas power to issue writs of attachment into another county. *Bowen v. Douglass*, 2 *Dall. Rep.* 45.

An attachment will lie against a member of Congress for not obeying a *subpœna*, if he is not attending a session, going to, or returning from Congress. *Respublica v. Duane*, 4 *Yeates' Rep.* 347.

Quere, Whether members of Congress are privileged from the obligations of a *subpœna*. *U. States v. Cooper*, 4 *Dall. Rep.* 341.

Where the party is present in Court, there is no occasion to make a rule for an attachment absolute, but sentence may be pronounced by the Court forthwith. *Respublica v. Oswald*, 1 *Dall. Rep.* 328.—AM. ED.

even if the party promise⁽¹⁾ such compensation on serving the attorneys, to whom a small additional remuneration is allowed, he is not entitled to any compensation for his loss of time; and *subpoena*, such promise being without consideration, will not support an action. If, having omitted to insist on receiving the necessary money at the time the *subpoena* is served, the witness ask for it when called, the Judge will not compel him to be sworn till fully indemnified; and he will not, by so refusing to give evidence, waive the right which he before had, to an action against the person who caused him to be served with a *subpoena*, but may still maintain such action in case the party, not choosing to pay the money at the time of the trial, declines to examine him.⁽²⁾

When a witness is in custody, or serving on board a ship, and his commanding officer will not let him attend, a *habeas corpus ad testificandum* is necessary; for which an application should be made to a Judge, upon affidavit, sworn by the party applying, stating that he is a material witness,⁽³⁾ and in the latter case that he is willing to attend.⁽⁴⁾ Upon this application the Judge will, if he think right, grant his *fiat* for the writ; but where it appears not to be done *bona fide*, but with a view of removing a prisoner in execution, the Court will refuse it.⁽⁵⁾ So where the defendant is in custody on a charge of high treason,⁽⁶⁾ or as a prisoner at war,⁽⁷⁾ it will not be granted without the consent of the Secretary of State. When this writ is granted, it is delivered to the officer in whose custody the witness is, who brings him up on being paid his reasonable charges.^(a) By Statute 43 Geo. 3, c. 140, Judges of the Courts at *Westminster* are empowered to grant writs of *habeas corpus* to bring prisoners before Courts martial, or commissioners of bankrupts, to give evidence in cases depending before them.

The person of a party or witness, attending the trial of a cause, is safe from arrest in any civil action while going to, staying, and returning from the place of trial; and if arrested during this time, the Court on which he is attending will discharge him and censure the officer. This privilege has been extended even to a party attending an arbitrator;⁽⁸⁾ and though in strictness it does not authorise a man to loiter or deviate from the way, yet Courts of Justice have not been very rigid in confin-

Ch. III. s. 7.
Remunera-
tion.

(1) *Mon v. Adam*, 5 M. & S. 156.
Willis v. Peckham, 1 Brod. & Bing. 515.

(2) *Hallet v. Mears*, 13 East, 15.

Witness in
custody.

(3) *Fortescue*, 396.

(4) *Rex v. Rodham*, Comp. 672.

(5) *Rex v. Burbage*, 3 Burr. 1440.

(6) *Langston v. Cotton*, K. B. Sittings after Trin. T. 55 Geo. 3.

(7) *Furley v. Wrenham*, Dougl. 419.

Protection
from arrest.

(8) *Spence v. Stuart*, 3 East, 89.

(a) The Sheriff is bound to bring up a person in custody on execution, to testify in a civil case, after the service of a writ of *habeas corpus ad testificandum*, and on being tendered the expenses for bringing up and returning the prisoner. *Noble v. Smith*, 5 Johns. Rep. 357.—Am. Ed.

Ch III. s. 7.
Protection
from arrest.

Lightfoot v.
Cameron,
2 Black. 1113.

Hatch v.
Blisset, Gibb.
Case K. B.
308. 2 Stra.
986. S. C.
cited.

ing the protection; therefore, where a defendant, who was attending his cause at the sittings, which was put off early in the day, stayed in Court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, and was arrested there while at dinner; the Court held that taking this refreshment did not destroy his privilege, and he was discharged. So where a witness having attended the assizes, on a trial which was over about four in the afternoon, staid in the assize town till after dinner the next day, and then, while going home in a coach, was arrested about seven in the evening, the Court ordered her discharge, though her residence was not above twenty miles from the place of trial. (b)

(b) If any person whose duty brings him to Court, whether as a juror, a party, or a witness, be arrested while attending Court, or *eundo et redeundo*, the Court, upon motion, will discharge him. *Ex parte M'Neil*, 3 Mass. Rep. 288.

A witness who attended from another State, to prove a will in the Supreme Court, who was arrested on his return home, by process from the Mayor's Court of New York, was discharged on motion by the Supreme Court. *Norris v. Beach*, 2 Johns. Rep. 294.

A party to an action, which has been referred to the decision of the Court upon a case stated, is privileged from arrest, while attending, going to, or returning from Court. *Ex parte M'Neil*, 5 Mass. Rep. 245.

But if a witness attend Court voluntarily, without being summoned, he will not be protected from arrest. *ibid.* 264.

In the Circuit Court it has been held, that the *privilege* of a suitor or witness, extends only to exemption from arrest, though the service of process, whether a *capias* or summons, in the actual or constructive presence of the Court, (as on the steps at the Court-House) would be a contempt. *Bligh v. Fisher et al.* 1 Peters' Rep. 41.

The privilege of a suitor does not extend to a person who has been surrendered by his bail in another cause, and is in actual custody at the time of arrest. *Davis et al. v. Cummins*, 3 Yeates' Rep. 387.

A writ of protection *ad testificandum*, suspends all civil process against the subject of it, while coming to, and attending upon Court, with a reasonable time for the witness to return home, after the rising of the Court. *Ex parte Hall*, 1 Tyl. Rep. 274. Et vide *Smythe v. Banks*, 4 Dall. Rep. 329.

The privilege of a suitor does not hold in the case of *judicial* process. *Sterret's Case*, 1 Dall. Rep. 356. *Hannum v. Askew*, 1 Yeates' Rep. 25. Sed contra, *Brooms v. Hurst*, C. C. U. States, Oct. Sess. 1804, 4 Dall. Rep. 387. cited 4 Yeates' Rep. 124.

The authority of *Sterret's Case* has been often doubted both at the bar, and on the bench, though never expressly overruled. 4 Dall. Rep. 388, n.

Where another Court has refused to discharge one of its own suitors from arrest, on the ground of privilege, the Supreme Court will not relieve on *habeas corpus*. *The Commonwealth v. Hambricht*. 4 Serg. & R. Rep. 140.

On an appeal from the Court of Common Pleas of Lancaster county, to the Supreme Court of Pennsylvania, sitting in Philadelphia, a witness attending thereon, was held to be privileged. *Miles v. M'Callough*, 1 Binn. Rep. 77.

The privilege that a witness attending a Court should be exempted from arrest is the right of the Court, and not of the party; therefore, an action of assault and

battery, and false imprisonment will not lie for such an arrest. *Moore v. Chapman*, Ch. III. s. 7.
 3 Hen. & Munf. Rep. 260. Protection from arrest.

Where the defendant in *London*, was summoned to attend an arbitrator at *Exeter*, and on his passage went to *Clifton*, where his wife then resided, for the alleged purpose of searching for papers necessary to his examination, at which place he staid the greater part of two days, the Court held, that although it might not be an unreasonable deviation, yet that his stay there being an unreasonable length of time, and it not being sworn that he was *occupied during all the time*, in the object for which he went thither, he was not protected from arrest. *Randall v. Gurney*, 3 Barn. & Ald. Rep. 252.—AM. ED.

END OF PART I.

A

COMPENDIUM, &c.

PART II.

CHAP. I.

OF EVIDENCE IN GENERAL, AS REGULATED BY THE PLEADINGS,
AND OTHER PROCEEDINGS IN A CAUSE.

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To ascertain the evidence necessary to support an action, the first thing to be attended to is the form in which the action is brought, and the statement of the case as contained in the declaration. In most instances the particular circumstances of the case are set forth, but in some few the law permits the use of a certain prescribed form, wholly fictitious, and quite contrary to the facts whereon the action is founded.

In the first class of actions, the plaintiff is bound to prove the facts stated in his declaration; any material variance between that statement and the evidence, will be fatal to his cause; and though in fact he may shew a good cause of action, yet not having truly stated it on the record, he fails on account of the variance.

To notice in this place the numerous cases which have arisen on variances between the pleadings and the evidence, would tend to confuse rather than to convey any intelligence to the reader.(a) It may be proper to observe in general, that when

(a) In an action on a written contract, the writing may be read to the jury, if it substantially comports with the narr. *Farmum et al. v. Barnum et al.* 1 Tyl. Rep. 72.

Though in an action for money had and received, a contract may be specially stated, which is a *sine qua non* of the plaintiff's recovery; yet if it is inducement only, and not the gist of the action, it is not necessary to shew the happening of a condition, which it would be inadmissible to shew in an action on the contract. *Toussay v. Preston*, 1 Con. Rep. 175.

the declaration contains impertinent matter, foreign to the cause,

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When the *narr.* stated a promise, that in consideration that the plaintiff *would endorse* a note signed by a third person, the defendant would hold himself liable thereon in the same manner, and though he had signed it with his proper name, and the evidence was of a promise in consideration of the plaintiff *having endorsed* such note; it was held that the evidence did not conduce to prove the *narr.* *Bulkeley et al. v. Landon et al.* 2 *Con. Rep.* 404.

Where the *narr.* in an action on a note, stated that the defendants, by a note *under their hands*, promised to pay; and the note exhibited in evidence, appeared to have been signed by *procuration*; it was held, that it was no variance, the allegation being according to the operation of law. *Phelps et al. v. Riley*, 3 *Con. Rep.* 266.

In an indictment on the 7th and 9th Sect. of the Act of Congress of 29th July, 1818, ch. 34, concerning cod-fisheries, the indictment having stated the purport of the written paper to be that the vessel was of the burthen of 14 tons, 45-95ths of a ton, whereas the paper produced, stated it to be 14 tons, 60-95ths of a ton, the variance was held fatal. *U. States v. Lakeman*, 2 *Mason's Rep.* 299.

Where the *narr.* is for a contract to carry salt for \$1.87.5 cents, a written memorandum of an agreement to carry for 15 shillings is admissible, and may be explained. *Salter v. Kirkbride et al.* 1 *South. Rep.* 223.

So, in an indictment for forging a deed, a variance in the courses, *as* 20 for 22, is material. *State v. Street*, *Tayl. Rep.* 123.

Where a name appears to be a foreign one, a variance of a letter which, according to the pronunciation of that language, does not vary the sound, is not a *misnomer*. *Petrie v. Woodworth*, 3 *Caines' Rep.* 319.

The *narr.* in ejectment being for a tract of land called *Rupalta*, and the title being for one called *Repalta*, is no variance, if proved to be the same land. *Mitchell et al. les. v. Grover*, 1 *Har. & Johns. Rep.* 507.

A variance in the name of a corporation, which does not render it materially different in substance, from the true name, will not injure, especially in proceedings in which the corporation are not a party to the record. *The People v. Runkel*, 9 *Johns. Rep.* 147.

A variance between the *writ* and *narr.* is cured after an inquiry of damages executed. *Froxwell, Esc. v. Fugate*, *Hardin's Rep.* 2.

So after an office judgment. *Kennedy v. Terril*, *ibid.* 492.

And after final judgment. *Palmer, Esc. v. McGinnis*, *ibid.* 505.

A variance between the evidence and *narr.* as to part of the plaintiff's demand, is not fatal. *Hanks v. Evans*, *ibid.* 45.

If one of two executors refer a matter in his own right, and one in right of his testator, and the referees award a sum of money to himself, and another to him and his co-executor, the award is good; and he may sue upon the covenant in his own name, and there will be no variance. *Macon v. Crump*, 1 *Call's Rep.* 575.

If the claim of the plaintiff is an attachment against an absconding debtor, be stated as for a certain sum due by a negotiable note, with interest from the day when such note should have been paid; and the bond for prosecuting the attachment describe it as sued out for *the sum of money mentioned therein*, (saying nothing about the interest) the variance is not material. *Smith v. Pearce*, 6 *Munf. Rep.* 585.

In an action of *scire facias* against bail, the defendant pleaded that another person *of the same name and description*, became bail, and traversed, that he was the person named in the bail piece, and the plea was held good. *Reynard v. Noble*, 2 *Johns. Cas.* 293.

Things written may be described by their *tenor*, or according to their *substance*; if described by their *tenor*, their very words must be followed, but the omission of

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and which the Master on a reference to him would strike out,

a letter, not altering the word, is not fatal; if described by their *substance* or *effect*, the very words need not be set out; it is sufficient if their *sense* and meaning be described. *State v. Bradley*, 1 *Hayw. Rep.* 463.

It is not sufficient to declare upon a written contract according to its legal effect and import, and not in its precise words. *Lens v. Padelford*, 10 *Mass. Rep.* 230. *Wildman v. Glossop*, 1 *Barn. & Ald. Rep.* 9.

In a suit for *words spoken*, there can be no *tenor*, therefore where the sense and meaning of the words set out in the indictment is the same with those proven, and clearly and distinctly so, though not the very same words, such evidence will support the indictment. *ibid.*

If the plaintiff declares in an action for a libel *que sequitur in his verbis scilicet*, the minutest variance between the libel offered in evidence, and the *narr.* will be fatal. *Harris v. Laurence et al* 1 *Tyl. Rep.* 156.

In an action for a libel, the libellous matter set forth in the *narr.* contained the words *U. States*, and in the paper produced in evidence it was written *United States*, the variance is immaterial. *Lewis v. Few*, 5 *Johns. Rep.* 1. Et vide *Southwick v. Stevens*, 10 *Do.* 443.

The Court will look to the context in order to decide whether the variance is material or not. *ibid.*

A variance in the *date* of a bond or *cum*, is fatal. *Gordon et al. v. Browne's exr.* 1 *Hayw. Rep.* 215.

Where the defendant was summoned as the executors of *A.* and the *narr.* charged him accordingly, and he pleaded *ne unquam executor*, and the plaintiff withdrew his *narr.* and filed another, charging him as *executor of the executor of A.* the variance between the writ and the count was held to be immaterial. *Jennings v. Cox*, 1 *Binn. Rep.* 588, in note. Et vide *Bell v. Allen*, 3 *Munf. Rep.* 118.

Where in a debt on a bond, a *capias* has issued against two, one of whom has been taken, and *non est inventus* has been returned as to the other, if the plaintiff declares on the bond, as the bond of the defendant, who has been taken, advantage can be taken of the variance only by demurrer, and it is not error after verdict. *Dillman v. Schultz*, 5 *Serg. & R. Rep.* 35.

Quere, Whether in any stage of an action, advantage can be taken of a variance between the writ and the *narr.* where the cause of action appears to be the same. *ibid.*

The rule is, that a trivial variation, in setting out a contract or written instrument is fatal: but the application of the rule must be confined to such cases, where either the plaintiff has the original in his possession, or can, by due exertions, obtain it. *Dunbar v. Jumper*, 2 *Yeates' Rep.* 74. Et vide *Umbehecker v. Russell*, 2 *Yeates' Rep.* 339. *Mugrove v. Gibbs*, 1 *Dall. Rep.* 216. *Dillingham v. The U. States*, C. C. April, 1806, *M. S. Rep.*

In an action for an escape, the plaintiff stated the substance of an execution in his *narr.* without setting it out in *hæc verba*, but in the execution produced in evidence there was a variance of one cent in the current of damage and costs; it was held immaterial. *Bissell v. Kip*, 5 *Johns. Rep.* 89. *Brooks v. Bennis*, 8 *Do.* 356. Et vide *Pemberton, &c. v. Scarce, Hardin. Rep.* 3.

In an action of debt on bond with a collateral condition, if the breach be assigned in the very words of the condition, it is sufficient. *Craighill v. Page*, 2 *Hen. & Munf. Rep.* 446. In such a case, after judgment by default, and writ of inquiry executed, no advantage can be taken of a variance between the *narr.* and bond, nor is the bond considered as part of the record, unless it be spread upon it by *oyer*, demurrer, to evidence, bill of exceptions, &c. *Craighill v. Page, ibid.*

such impertinent matter will be rejected by the Court, and need not be proved. (b) But where facts themselves unnecessary and

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Where the *narr.* lays a promise by the defendant to pay and content the plaintiff "for two bonds which the plaintiff had in his possession, executed by a third person to the plaintiff," the bonds must be produced on the trial, or they must be proved to be lost or destroyed. *Dean v. McPherrin*, 2 *Serg. & R. Rep.* 69. Dougl. 667. 2 Black. 1104.

Quere, if after verdict the Court would presume they were produced. *ibid.*

In assigning the breach of the condition of a bond, the variance to be fatal, must be material. *Hawkin's exr. v. Berkeley*, 1 *Wash. Rep.* 260. *Buster's exrs. v. Wallace*, 4 *H. & Munf. Rep.* 32.

What variances between a judgment and the recital thereof, in a *scire facias*, or in the judgment thereon, are not immaterial. *Lyon's exr. v. Gregory*, 3 *Hen. & Munf. Rep.* 237.

Where debt is brought on a covenant to pay a sum certain, any variance of the sum in the deed will vitiate it. But where the deed relates to matter of fact extrinsic, there, though the plaintiff declare for more than is due, he may enter a *remittitur* for the balance. *U. States v. Colt*, 1 *Peter's Rep.* 153. Et vide *Hammett v. Bullitt's exrs.* 1 *Call. Rep.* 568.

In an action on a promise of indemnity, made by the defendant, against *A.* the plaintiff declared that *A.* had recovered against him a certain sum. Proof of a recovery of a different sum by *A.* is not a fatal variance, because the recovery is stated only by way of inducement, and not as the ground of the suit. *Ripsher v. Shane*, 3 *Yeates' Rep.* 575. Et vide *Livingston v. Swanwick*, 2 *Dall. Rep.* 300.

Where the *narr.* was for obstructing the waters of *D. Creek*, and the evidence was of obstructions in the waters of *J.* near the mouth of *D. Creek*, the variance was ruled to be fatal. *Funk v. Arnold*, 3 *Yeates' Rep.* 428.

In an action on a single bill, the plaintiff averred in the *statement*, that the bill was assigned by himself *John Adam L. executor of A.* to *B.* who re-assigned it to the plaintiff, and offered in evidence a bill, agreeing in all respects with the *statement*, except that the assignment was by *Adam L.* but made "agreeably to the will of *A.*" (It being granted that *John Adam L.* was *A.*'s executor.) Held, that the evidence was inadmissible on the issue of *non est factum*. *Lautermilch v. Kneagy*, 3 *Serg. & R. Rep.* 202.

Where a *narr.* recited that *E. Brown* was attached to answer, &c. and then charged the defendant as *Elisha Brown*, on a bill of exchange drawn by him in favour of the plaintiff, a bill of exchange signed *E. Brown*, and the hand writing of which was proved to be that of *Elijah Browne*, was ruled to be inadmissible. *Craig v. Brown*, 1 *Peter's Rep.* 139.

Where the plaintiff declared by the name of *William T. Robinson*, and gave in evidence a deed to *William Robinson*, the omission of the middle letter was held an immaterial variance, for the law knows of but one christian name. *Franklin v. Talmadge*, 5 *Johns. Rep.* 34.

Where the *narr.* on a promissory note, alleging a demand of payment in general terms, as "although requested," &c. it was held good, especially after verdict. *Leffingwell et al. v. White*, 1 *Johns. Cus.* 99.

Where a note not negotiable was declared upon as being *for value received*, and which words were not in the note produced in evidence, it was held that they were descriptive of the note, and that therefore the variance was fatal. *Saxton et al. v. Johnson*, 10 *Johns. Rep.* 418. Et vide *Thomson v. Jamieson*, 1 *Cranch's Rep.* 282.—*Am. Ed.*

(b) Where matter is alleged in a *narr.* which might have been struck out, on motion, as surplusage, it need not be proved at the trial. *Allaire v. Onlund*, 2 *Johns. Cas.* 52.

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immaterial, but at the same time not wholly impertinent, are set out in the declaration, these must be proved, though no evidence would have been required of them, had they not been alleged.

2 East. 462.

This rule was more clearly expressed by Mr. Justice LAWRENCE, in the case of *Williamson v. Allison*, who said, "that if the whole of an averment may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." Accordingly

Williamson v.
Allison, 2
East, 446.

in that case, which was in *tort* for the breach of a warranty of goods, where it was charged in the declaration, that the defendant knew the goods to be of bad quality, it was held that the plaintiff need not prove the *scienter*; because, if that averment were struck out altogether, the plaintiff might still maintain his action on the warranty; but where a declaration against a Sheriff, for taking the goods of a tenant without paying a year's rent to the landlord, averred that the rent was payable quarterly, whereas it was payable yearly, the variance was held to be fatal; for if the whole averment, as to the rent, had been struck out, the plaintiff could not have maintained his action, because some rent must necessarily have been averred to be due.

Bristow v.
Wright,
Doug. 665.

In general, dates and sums are immaterial, and being stated under a *videlicet*, the party is not bound to strict proof;(c) but

Words in an indictment cannot be rejected as surplusage, which may have been the ground of conviction. *Commonwealth v. Atwood*, 11 Mass. Rep. 93.

But in an indictment for stopping the mail, a contract with the Postmaster General to transport the mail was alleged, and it was held that it must be proved, although the indictment would have been good without it. *United States v. Porter*, 3 Day's Rep. 283.

A contract must be proved as laid in the narr. *Crawford v. Murrell*, 8 Johns. Rep. 253. *Cunningham v. Kimball*, 7 Mass. Rep. 65. *Baylies et al. v. Pettyplace et al. ibid.* 325. Sed vide *Leath v. Cooper*, Cooke's Rep. 249.

An allegation of fraud or warranty in a sale, must be proved precisely as laid. *Snell v. Moses*, 1 Johns. Rep. 96. *Perry v. Aaron*, *ibid.* 129.

Evidence that a contract was enlarged by *parol*, will not support a narr. on the contract as originally made. *Philips v. Rose*, 8 Johns. Rep. 392.—AM. ED.

(c) The day laid in the declaration, in an action on a *parol* contract, is not material upon evidence. *Stout v. Russel*, 2 Yeates' Rep. 334.

Nor in trespass, provided it is previous to the bringing of the action. *Charles v. Delpux*, 2 Brown's Rep. 319. Et vide *Witherspoon v. Isbell*, 1 Hayw. Rep. 12.

If no day is laid, or an impossible day, the defect will be cured by verdict. *Charles v. Delpux*, 2 Brown's Rep. 319. Et vide *Allaire v. Onland*, 3 Johns. Cas. 52.

If a declaration contain two counts, and one of them state a cause of action, which

where any written instrument or record is stated, or the exact time or money is material to the merits of the cause, it then becomes necessary to prove the fact exactly as laid. Here, however, a distinction must be attended to between an allegation of substance, which it may be necessary to produce a record for the proof of, and an allegation of description which affects to state the contents of a record. In the former case, it is sufficient if it be substantially proved; in the other, the least variance will be fatal. Thus, if it be alleged that any fact happened on a day laid under a *videlicet*, and no reference be made to any record, the variance in the day will not be fatal, unless the day be material to the merits of the action; (d) and therefore where, in an action for a malicious prosecution, the declaration stated, that "afterwards, to wit, on the morrow of the Holy Trinity, in the 46th year, &c. at Westminster aforesaid, in the Great Hall of Pleas there, before, &c. the plaintiff was in due manner and by due course of law acquitted;" the allegation was held to be proved by the production of the record of *Nisi Prius*, though it thereby appeared that the acquittal took place on *Tuesday* next after the end of Easter Term; for the substance of the allegation was only that he was acquitted before the commencement of the action. So the statement of a *feri facias* to have been for a debt, and 80s. damages sustained by reason of the detention thereof, when the writ mentioned the 80s. to have been given for the damages sustained as well by reason of the debt as for the costs and charges of the suit, was held to be no variance; because, in law, the costs were part of the damages sustained by reason of the detention of the debt. In these cases, however, had the plaintiff taken upon himself to describe the record by a *prout patet*, &c. it seems that he would have been bound down to more literal statement. And where a writ was stated to have been returnable on a particular day, and on production it appeared the day was mis-stated, this,

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Parcel v.
Maenamaru,
9 East, 157.
Contrary to
Pope v. Fos-
ter, 4 T. Rep.
590.

Phillips v.
Bacon, 9 East,
298.

Green v.
Rennet,
1 T. Rep. 656.

had not accrued when the suit was commenced, and a general verdict be found for the plaintiff, judgment will be reversed on error *Stewart v. M^r Bride*, 1 Serg. & R. Rep. 202.

Wherever time is issuable, it ought to be alleged with certainty. *Hubble v. Hubble*, *Hardin's Rep.* 294.

Wherever the time of doing a thing is immaterial, evidence of a different time is admissible. But where it is material, it must be proved as laid. *Jordan v. Cooper et al* 3 Serg & R. Rep. 576. *Fall v. Lewis et al.* & *Johns. Rep.* 450. Et vide *U. States v. Vigol*, 2 Dull. Rep. 346.—AM. ED.

(d) Vide *U. States v. Burnham*, 1 *Mason's Rep.* 57.—AM. ED.

Part II.
Variance in
circum-
stances.

being a misdescription of the writ, was held to be a fatal variance.(e)

Carlisle v.
Treas.,
Cowp. 671.
Grimwood
v. Barrit,
6 T. Rep. 460.

In an action for usury, the loan was stated to have been made on the 21st of *December*, when in fact it took place on the 23d ; and the plaintiff was non-suited on account of this variance.(f) So in a plea of set-off to a bond, where the defendant is required by the Statute to set out in his plea the exact sum due to the plaintiff ; if he state a less sum to be due than actually is, the sum so stated may be traversed, and the defendant will fail on his plea.

Durston v.
Tutham, cor.
Buller at N.
P. cited 3 T.
Rep. 67.

In the above cases, the days and sums were so material, that no form of pleading could have helped the party ; but where the day or sum is not material to the merits of the cause, the plaintiff may, by stating it under a *videlicet* (as observed above) escape the danger of a variance, which might otherwise be fatal. Thus, where a declaration on a warranty of sheep stated, that in consideration, the plaintiff would buy of the defendant forty-five sheep for 54*l.* 11*s.* 6*d.* the defendant promised they were sound ; and it appeared in evidence, that the price was 54*l.* 12*s.* 6*d.* ; this not being laid under a *videlicet*, the plaintiff was non-suited ; but had the declaration stated the purchase to have been for a large sum of money, *to wit*, 54*l.* 11*s.* 6*d.* the variance would have been immaterial.(g)

1 T. Rep. 240.

Contracts should, in all cases, be truly set out ; if the contract be different from the declaration in any part, the whole foundation of the action fails ; because the contract is entire.(h)

Griffin v.
Blandford,
Cowp. 62.

(e) A variance between the *narr.* and the bond of which *oyer* is given, is matter of demurrer, and not of error. *Douglas v. Beam*, 2 Binn. Rep. 76.

A variance between the *narr.* and the bond on *oyer*, is material, and will be fatal on the plaintiff's special demurrer to the bad rejoinder of the defendant. *Cooke v. Graham*, 3 Cranch's Rep. 229.

To take advantage of the covenant declared on, and that which appeared on the instrument, *oyer* should have been prayed. *Anony.* 1 Hayw. Rep. 149.

In an action of *detinue* for two resolutions of the General Assembly granting money to the plaintiff, a variance between the writ and *narr.* as to their date, should have been pleaded in abatement after *oyer* of them had been craved. *Lewis v. Williams*, 1 Hayw. Rep. 150. *Adams v. Spear*, *ibid.* 215.—AM. ED.

(f) In debt, on the Act against usury, a variance between the dates of the contract, laid in the *narr.* and proved on the trial, is fatal. *Evert v. Barr*, 4 Yeates' Rep. 99.—AM. ED.

(g) A *scilicet* repugnant to the preceding matter, may be rejected as surplusage. *Vail v. Lewis et al.* 4 Johns. Rep. 450.—AM. ED.

(h) In an action of *assumpsit* against a carrier for the loss of goods, when a contract is alleged to carry them from *A.* to *B.* a variance in the evidence as to the *terminum*, is fatal. *Tucker v. Cracklin*, 2 Starkie's Rep. 285.—AM. ED.

So where a *right* or *custom* is pleaded, it should be stated with all exceptions and modifications to which it is liable; otherwise the pleading will not be supported by the evidence. If a custom be stated as that of a particular place, evidence will not be received of the like custom prevailing in a place adjoining. Thus, the custom of tithing in the parish of *A*. will not be evidence of the custom of tithing in the parish of *B*. if the custom of that parish only be pleaded.⁽¹⁾ But had it been laid as the custom of a larger district, including both *A*. and *B*. it would have been evidence in support of the issue.⁽²⁾ In like manner the custom of one manor will not be evidence of the custom of another adjoining, unless in cases of some general law or quality, of which description is the general rule of most manors in the northern counties bordering on *Scotland*, and therefore called Border Law, that the tenant shall be admitted, and pay a fine on the death of every new Lord.⁽³⁾ On the same principle, a general custom, that one-half of a river shall be fished by the Lords of the different manors on each side of the water, has been admitted as evidence of the right in the particular instance;⁽⁴⁾ and when the dispute has been concerning the right to a particular part of a large tract of land, acts of ownership on other parts of the same tract have been also received,⁽⁵⁾ it being first shewn that it was an entire waste. ⁽⁶⁾ So where a manor has been encircled by a belt of trees, some of which lay contiguous to closes belonging to different owners; the cutting of trees by the Lord contiguous to the close of *A*. has been held evidence of his right to those in the same belt, contiguous to the close of *B*.⁽⁷⁾ And where in trespass and false imprisonment, the defendant justified, as Serjeant at Arms of the House of Commons, acting under the speaker's warrant, for arresting the plaintiff for breach of privilege, and the issue was upon an alleged excess of authority in the officer executing the warrant, by using an excessive and unnecessary military force, and breaking the plaintiff's house after demand of entrance and refusal; evidence was received of acts of violence by the mob, committed in parts adjacent, though out of view and hearing of the plaintiff in his house, such violence appearing to be connected with the same purpose as actuated those about the plaintiff's house.⁽⁸⁾

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(1) *Forneaux v. Hutchins*, Cowp. 807.

(2) *Ibid*.

(3) *Dean and Chapter of Ely v. Warren*, 2 Atk. 189. *Duke of Somerset v. Francis*, 1 Stra. 654.

(4) *Vide 1 Maule & Selw. 662*.

(5) *Barry v. Rabbington*, 4 T. Rep. 514.

(6) *Tyrwhitt v. Wynne*, 2 B. & A. 554.

(7) *Stanley v. White*, 14 East, 332.

(8) *Burdett v. Coleman*, 14 East, 183.

In cases where the law gives a general form of declaration, as in trover, ejectment, &c. the plaintiff has only to prove his title to recover, and by a fiction of the law, that title is considered as

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proving the case stated on the record, and the jury are directed to find the facts so stated.

Actions may be again considered as they are *local* or *transitory*. Local actions must, as the term implies, be laid in the county where the cause of action arises. The county is in this case a material circumstance in the cause, and unless the plaintiff prove it as laid in the declaration, the variance is fatal to his action.⁽ⁱ⁾

But though the *county* is material in all local actions, yet the *place* within it is not always so material; and where this is the case, the place mentioned in the declaration, if named merely as a venue and not as a local description of the injury, need not agree with the proof. Therefore, where in an action for a nuisance to the navigation of the *Irwell*, by diverting the water from it, the declaration stated that the plaintiffs, to wit, *at A.* were proprietors of a certain river *there* called the *Irwell*, and that the defendant *at A. aforesaid*, erected a weir, and thereby diverted the water from the river, and injured the navigation; it was held to be sufficient to prove that such an injury was done to the navigation on that river at any place within the county; for as it was unnecessary to give a local description either of the property, or of the thing which caused the injury,

Mersey and
Irwell Navigation Comp.
v. Douglas,
2 East, 497.

(i) In an action of debt against a Sheriff for the escape of a prisoner in his custody on execution, the *narr.* alleged a judgment recovered in the Court of Common Pleas, of the term of, &c. held at *Salem*, in the county of *Washington*, &c.; in the record of the judgment produced at the trial, the place or town where the Court was held was not mentioned; it was held that the variance was not material. *Page v. Woods*, 9 *Johns. Rep.* 82. Et vide *Rodman et al. v. Ferman*, 8 *Johns. Rep.* 21. *Page v. Woods*, 9 *Do.* 82.

An action against a Sheriff for a *misfeasance in office*, is not local, and he may be sued therefor out of his own county. *Foster v. Baldwin*,

An action for *use and occupation* is founded on *privity of contract*, and is therefore transitory. *Corporation of New York v. Dawson*, 2 *Johns. Cas.* 335. *Low v. Hallett*, 2 *Caines' Rep.* 374.

Debt on judgment is *local*; so debt on the judgment of the Court of Common Pleas, must be brought in the county where the judgment was given. *Barnes v. Kenyon*, 2 *Johns. Cas.* 381.

So a *scire facias* to revive a judgment. *M^r Gill v. Perrigo*, 9 *Johns. Rep.* 259.

An action for an escape is not local to the county in which the judgment or writ, by virtue whereof the prisoner was arrested, is filed of record. *Bogert v. Eildredh*, 1 *Caines' Rep.* 1.

Quere, Whether the *venue* ought not to be laid in the county in which the escape was made. *ibid.*

An action on a covenant of seisin, is local. *Clarkson v. Gifford*, 1 *Caines' Rep.* 5.

In injuries to personal property, the action may be brought wherever the defendant can be taken, although the cause of action arose in another state or country. *Glen v. Hodges*, 9 *Johns. Rep.* 67.

and the declaration did not give a particular description of either, *A.* was considered merely as a venue, and therefore immaterial.

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In those actions which are *transitory*, the plaintiff has the privilege of electing any county he pleases, and here, as both the place and county laid in the declaration are merely *formal*, it is not necessary that either should agree with the proof. Thus where in an action for running down the plaintiff's boat, the declaration stated the injury to have been done *near Half-Way Reach*, in the River *Thames*; and it was proved to have happened in *Half-Way Reach*; the proof was held to support the declaration. So where an action of *assumpsit* was brought, on an agreement to procure the plaintiff a booth at a horse-race, and the declaration stated that there was a race upon *Barnet Common, in the county of Middlesex*; and it appeared in evidence, that the whole of *Barnet Common* was in *Hertfordshire*; this was also held to be no variance.

Drewry v.
Twiss, 4 T.
Rep. 558.

Frith v. Gray,
Ibid. 561, n.

In these transitory actions, however, the defendant may change the venue by motion to the Court, founded on an affidavit that the cause of action arose wholly in another county; and the plaintiff cannot bring it back to the county where it was originally laid, without undertaking to give material evidence in that county. (k) This undertaking makes the action in some

Santler
v. Heard,
2 Black. 1031.

(k) After issue joined, the defendant may apply to have the *venue* changed, provided a trial has not been lost, and it will occasion no delay. *Delavan v. Baldwin*, 3 *Caines' Rep.* 104. *Kent v. Dodge*, 3 *Johns. Rep.* 447.

The Court has an equitable power over *venue*. *Munroe v. Downing*, 2 *Johns. Rep.* 453.

To change the *venue* in a transitory action, very special cause must be shewn. *Woods v. Van Rankin*, 1 *Caines' Rep.* 122.

In *Hartshorne's les. v. Putton*, 2 *Dall. Rep.* 252, the Court refused to direct the Sheriff to return a jury from the county exclusive of the city of *Philadelphia*.

The *venue* will not be changed from the city of *New York*, because the corporation are plaintiffs. *Corporation of New York v. Dawson*, 2 *Johns. Cas.* 335.

In an action against a Sheriff, the supposed influence of his office in his county, is not a reason for changing the *venue*. *Baker v. Sleight*, 2 *Caines' Rep.* 46. Et vide *New Windsor Turnpike v. Wilson*, 3 *Caines' Rep.* 137.

The *venue* will be changed in a suit on a promissory note, the defendant swearing to a defence, and that his witnesses reside in another county. *Allen v. Brace*, 1 *Caines' Rep.* 107.

But it will not be changed because there is a party spirit in the county, where the action is brought, against the party applying. *Zobieskie v. Bander*, 1 *Caines' Rep.* 438.

In an action for a libel, the Court will not change the *venue*, on the common affidavit, from the county in which it circulated to that in which it was first printed and published. *Clinton v. Cromwell*, *Col. & Caines' Cas.* 399.

In *Virginia*, the Superior Court of Chancery have power, upon general principles

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place.

degree local, and unless the plaintiff comply with the condition, he will be nonsuited on the trial. The defendant therefore should, in all cases where the plaintiff has so undertaken, be prepared to produce the rule at the trial, in order to bind the plaintiff to his engagement.

1 Sid. 442.

It was formerly held, that on an undertaking of this nature, the plaintiff could not give any evidence which arose in another county, but that all his evidence must arise in the county wherein the venue was laid; but it is now deemed sufficient if he give any one material piece of evidence arising in that county; and even in actions in their nature local, if the different facts which constitute the right of action arise in different counties, the plaintiff has his election in which to lay his cause.

Salk. 669.

2 T. Rep. 241.

A deed enrolled in *Middlesex*, a commission of bankruptcy tested there, (1) or as was held in one case, (2) the production of a rule for payment of money into Court in the action, though obtained after the rule to change the venue was discharged, is a sufficient compliance with the undertaking to give material evidence in that county: but in a subsequent case, (3) the Court of Common Pleas held, that only the proof of facts necessary to sustain the action, and not any matter in answer to the plea, would be sufficient; and therefore, where the defendant pleaded a tender, and the plaintiff replied and proved a subsequent demand and refusal within the county, they determined that he had not satisfied the undertaking.

(1) *Kensington v. Chantler*, 2 M. & S. 36.

(2) *Watkins v. Towers*, 2 T. Rep. 275.

(3) *Cockerill v. Chamberlain*, 1 Taunt. 519.

(4) *Gerard v. Roebuck*, 1 H. Black. 280.
McClure v. McKeand, 2 Taunt. 197.
S. P.

(5) *Calliaud v. Champion*, 7 T. Rep. 293.

(6) *Collins v. Jacobs*, 3 Bos. & Pul. 597.

(7) *Hunt v. Bridgewater*, 1 Taunt. 259.

So it has been said, that proof of the cause of action arising in a foreign country, is sufficient, (4) though the safer way in this case seems to be to apply to the Court to discharge the rule. (5) In one case where the cause of action arising in *A.* the venue was laid in *B.* and an attempt was made to change it to *C.* the Court of Common Pleas refused to change the venue; (6) and in another late case, (7) in the same Court, where the venue being laid in *London*, the defendant moved to change it to *Lancashire*; on which the plaintiff produced an affidavit, that the cause of action arose in *Surrey, Middlesex* and *London*, being

of equity, to admit the venue to be changed after issue joined in a county or inferior Court, where it appears that strong prejudices exist against a defendant, which were unknown to him, until such issue was joined, and that a fair and impartial trial could not be expected in the Court where the suit was depending. *Darmsdatt v. Wolfe*, 4 Hen. & Munf. Rep. 246.

In *South Carolina* it has been ruled, that where the inhabitants of a parish are liable to pay for repairing or making a causeway, they are interested in the suit respecting it, and therefore it is a good cause for changing the venue. *Lynch's exrs. v. Horrey*, 1 Bay's Rep. 228.—A.M. Ed.

for goods sold in *Middlesex*, and delivered, some in *London*, and others in *Surrey*, the Court retained the venue upon the plaintiff undertaking in the alternative to give material evidence in one of those counties; but in a case similar in its circumstances to that of *Collins v. Jacobs*, above referred to, the Court of King's Bench refused to bring back the venue without the usual undertaking.⁽¹⁾ The bare circumstance of the witnesses residing in the county where the venue is laid, will not alone satisfy the undertaking.⁽²⁾

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place.

(1) *Price v. Woodburne*, 6 East, 433.

(2) *Santler v. Heard* ut sup.

Another method by which the defendant may confine the generality of the plaintiff's statement, and consequently narrow his proof, is by obtaining a Judge's order for the particulars of the plaintiff's demand. This is granted almost as of course in most actions founded on contract, and when a bill of particulars is delivered under the order, the plaintiff will not be permitted to give evidence at the trial of any demand not contained therein. Thus if, in a bill of particulars so delivered, the plaintiff state his cause of action to be on a promissory note only,⁽³⁾ and it appear that the note is void for want of a stamp, the plaintiff cannot go into evidence of the consideration whereon it is founded though the declaration contain counts on such consideration; but on such a particular he may recover the interest due on the note, as well as the principal secured by it.⁽⁴⁾ Again, where the declaration contained counts for goods, sold and delivered, and for money had and received, and the plaintiff delivered a particular merely for horses sold to the defendant; the Court held that he was precluded from going on his count for money had and received, and proving that the defendant had sold horses on his behalf to third persons, and received the money for them;⁽⁵⁾ but a mere error in the statement of the time when work was done, where such error cannot mislead the defendant, will not prevent the plaintiff from recovering.⁽⁶⁾ If the plaintiff has inadvertently delivered a particular not applicable to his case, he should apply by summons to a Judge to amend it, for it was in one case held by the Court of Common Pleas, that he could not do so by merely delivering a second bill of particulars.⁽⁷⁾

Order for
particulars
of demand.

(3) *Wade v. Beasley*, 4 Esp. Cas. 2.

(4) *Blake v. Lawrence*, 4 Esp. Cas. 147.

(5) *Holland v. Hopkins*, 2 Bos. & Pul. 243.

(6) *Millwood v. Walter*, 2 Taunt. 224.

(7) *Brown v. Watts*, 1 Taunt. 353.

As the rules of pleading allow, in some cases, a general form of declaration to the plaintiff, so in many actions the defendant is allowed a general form of plea, which disputes every thing in the declaration, except those legal fictions which are considered as indisputable; and puts the plaintiff upon proving the whole of the case he has stated in the record.

Part II.
General issue, &c.

4 Anne, c 16.

Rule to pay
money into
Court.

(1) Gutteridge
v. Smith, 2 H.
Black. 374.

In other forms of action, on the contrary, the defendant is by the rules of the common law obliged to select a particular part of the declaration in his plea, and the plaintiff is not compelled to prove more than the fact which is denied by it. Since the Statute for the amendment of the law, however, this distinction is in a great measure done away; for, though the defendant cannot by one compendious plea deny the whole of the declaration, he may, by leave of the Court, plead several distinct pleas to each part of it; and so put the plaintiff on proving the whole.

But though the defendant may, by the *general issue* alone, in actions where such plea is allowed, put the whole of the case stated in the declaration in issue, yet there are some acts by which he is considered as partially admitting the declaration, notwithstanding that plea. In all cases of contract, where the damages are certain and liquidated, the defendant may at the time he pleads, obtain a rule for leave to pay so much money into Court as he admits to be due; and this payment so far controls the general issue, as to prevent the defendant from disputing that he did contract in the manner stated in the counts on which money is so paid, and reduces the question between the parties to the quantum of damages which the plaintiff is entitled to recover.⁽¹⁾ Thus, if in an action on a bill of exchange, the defendant pay money into Court on the whole declaration, the bill, being admitted by this act of the defendant, need not be proved by the plaintiff on the trial.⁽¹⁾ So where a defendant paid 5*l.* into Court on a declaration against him as a carrier, stating a general contract to carry the plaintiff's goods, it was held that the plaintiff was not bound to give further evidence than the production of the rule, and proof that the goods were of greater value than the money paid into Court; and that it was not competent to the defendant to prove a general notice, that he "*would not be responsible for more than 5*l.* for any species of property contained in any article lost or damaged, unless the same were booked and paid for according to the va-*

(1) Payment of money into Court, admits the cause of action as stated in the plaintiff's narr. *Johnston v. Col. Ins. Co.* 7 Johns. Rep. 315.

Where money is paid into Court on a policy of insurance, under a sale for that purpose, the plaintiff by taking it out will not be precluded from proceeding for a total loss, when he informs the defendant's attorney at the time of his intention to proceed for a total loss. *Sleight v. Rhinelanders et al.* 1 Johns. Rep. 192.

In a suit on a bond for "*for lawful money of North Carolina*," the Court refused to admit paper bills of credit, issued by that State, to be paid into Court, it not appearing that the bills were made a legal tender. *Shelby v. Boyd et al.* 3 Yeates' Rep. 321.—AM. ED

lue;" for that by paying money into Court, the defendant had admitted the contract, as stated in the declaration, and that he had undertaken to the full amount of the goods.(1) But in a subsequent case,(2) where the notice was, "*that no more than 5l. would be accounted for*, for any goods or parcels, unless entered as such, and paid for accordingly," the Court held that the plaintiff might state the contract of the defendant in general terms, and that by paying money into Court on such a general declaration, the defendant would not admit more than his contract for the safe carriage of the goods, nor preclude himself from shewing that he was, by reason of the notice, not liable to damages beyond that sum; for that the notice did not alter the contract for the safe carriage of the goods, but only limited the amount of the damages, in case the contract should be broken. In this latter case the Court said that the case of *Yate v. Willan* could not be supported in its full extent; for although the payment of the money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision, as to the amount of damages to be recovered in case of loss. And in a subsequent case, where on a declaration containing counts on a policy of insurance, and for money had and received, &c. the defendant paid money into Court generally, it was held that he did not thereby preclude himself from disputing his liability beyond such payment, for goods which were not loaded according to the terms of the policy.(3)

If an action be brought for a demand compounded of different items, some of which are founded on good and others on illegal considerations, and the defendant pay money into Court on the whole declaration, the plaintiff will not be permitted to apply the money so paid in satisfaction of the illegal demand, and to recover the other; for, the payment of money into Court is an admission of a legal demand only, and not of one founded on a corrupt consideration.(4)

The payment of money into Court under a rule of Court, being a proceeding in the course of a cause, it is obviously the duty of the plaintiff not to call for evidence of it; and if, in violation of this duty, he puts the defendant on this proof, such evidence will not entitle the plaintiff to the reply.(5)

Similar in effect is the plea of tender, by which the defendant admits that the plaintiff has some cause of action, and therefore he cannot afterwards call on the plaintiff to give further evidence than is necessary to shew the amount of the debt. Thus, if in

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(1) *Yate v. Willan*, 2 East, 128.

(2) *Clarke v. Gray*; *Marsden v. Gray*, 6 East, 564.

(3) *Mellish v. Alnutt*, 2 M. & S. 106.

(4) *Ribbans v. Crickett*, 1 Bro. & Pul. 264.

(5) *R. v. Gen. C. B. Hill*, 50 Geo. 3, 2 Taunt. 267.

Plea of Tender.

Part II.
Pleas in
abatement.

(1) *Middleton v. Brewer, Peake's Cas.* 15.

an action founded on a promise to pay the debt of a third person, (which by the Statute of Frauds, must be in writing,) the defendant pleads a tender, the plaintiff will not be called on to prove the promise, but only the amount of the debt due from the person on whose behalf the promise was made. (1)

Besides the pleas which go to the merits of the action, there are others which only *abate* it, on account of some disability in one of the parties, or informality in the proceeding; and as these do not deny the right of action, they must give the plaintiff a better writ. (m)

It would be quite foreign to the purpose of the present work, to go through the several matters which may be pleaded in abatement; it is sufficient to observe, that the issue in most of them when traversed, lies on the defendant, who must prove the facts stated in his plea. Nevertheless, in actions of *assumpsit*, and other actions where damages are to be recovered, the plaintiff must prove his cause of action to ascertain the amount of the damages.

A distinction which has been taken between actions of contract and actions of *tort*, may also be properly noticed in this

(m) The rule requiring the defendant when pleading in abatement to give the plaintiff a better writ applies to the averment of facts only. *Brown v. Gordon*, 1 *Greenl. Rep.* 165. Et vide *Jewett v. Jewett*, *adm.* 5 *Mass. Rep.* 275.

Defects in a writ, when not apparent on the record, must be shewn by plea in abatement. *Cooke v. Gibbs*, 3 *Mass. Rep.* 193.

In an action on a note given by a company, when the defendants pleaded in abatement, that another person belonged to the company who was not sued; it must appear by the plea, that he was of the company when the note was executed. *Answorth v. Dyer*, 2 *Root. Rep.* 202.

A plea in abatement that other persons ought to have been joined as plaintiffs in the writ, should set forth particularly who those persons are, and describe them so as to enable the plaintiff to make a better writ. *Wadsworth v. Woodford*, 1 *Day's Rep.* 28.

A plea in abatement to a former action must shew that it is pending, and must refer to the record. *Clifford v. Coney*, 1 *Mass. Rep.* 495.

A want of form in such a plea may be taken advantage of on a general demurrer. *ibid.*

Alienage must be pleaded in abatement, except in real actions. *Swell v. Lee*, 9 *Mass. Rep.* 368. *Martin v. Woods*, *ibid.* 377. *Hutchinson v. Brock*, *ibid.* 119.

A plea in abatement that the defendant was a *feme covert*, was stricken off, because there was no affidavit. *Rapp v. Elliott*, 2 *Dall. Rep.* 184. *S. C.* 1 *Yeates' Rep.* 185.

A dilatory plea should always be sworn to. *Day v. Hambergh*, 1 *Browne's Rep.* 77.

A plea in abatement that there were other executors not named in the writ, was held bad, because the plea should have stated that those other executors were qualified and took upon themselves to execute the will. *Burrow v. Setter's exrs.* 1 *Hayw. Rep.* 501.—*AJ. E.D.*

place. In the former, if one of several partners or joint-tenants bring an action alone, the defendant may give the right of the others in evidence on the *general issue*, and the plaintiff will on such evidence be nonsuited.(1) But if an action of *tort* be brought by one partner alone, this must be pleaded in abatement, or else the defendant will be precluded from proving the fact for any other purpose than that of taking off a moiety of the damages.(2) If the defendant be liable jointly with other persons who are not joined, and is sued in *assumpsit* or other action founded on contract, this must be pleaded in abatement.(3) In some cases(4) where actions against carriers have stated facts which implied a contract, though the form adopted has been *tort*, it has been considered that the defendant was equally entitled to this plea, as if an action of *assumpsit* had been brought;(n) but it has been since held by the Court of King's

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Pleas in
abatement.

(1) *Legh v. Champante*, 2 Stra. 820.

(2) *Bloxham v. Hubbard*, 5 East. 407.

(3) *Rice v. Shute*, 5 Burr. 3611.

(4) *Vide Badde v. Wilson*, 6 T. Rep. 369.

(n) An action of *tort* may be brought against one or more defendants, and if two defendants join in pleading the general issue, and the jury exculpate the one, and find the other guilty, this will be no cause of setting aside the verdict. *Wright v. Cooper*, 1 Tyl. Rep. 425.

In a *book debt* suit, under the Statute in *Connecticut*, brought against one on a joint contract, to take advantage of it, the plea must be in *abatement*, and cannot be used on the general issue. *Bradley v. Camp*, *Kirb. Rep.* 77.

In an action of *assumpsit*, a plea that the promise was made by the defendant, and one of the plaintiffs jointly, and not by the defendant separately, must be pleaded in abatement. *Robinson v. Fisher*, 3 *Caines' Rep.* 99. *Ruggles v. Patton*, 8 *Mass. Rep.* 480. *Barstow et al. v. Fossett*, 11 *Do.* 250.

So in a similar action where there are several persons jointly indebted or jointly responsible, and all of them are not defendants, it must be pleaded in abatement, and cannot be taken advantage of at the trial. *Ziele et al. v. Campbell*, *exr.* 2 *Johns. Cas.* 382.

Our joint owner of a chattel may bring *trover* or *trespass* for his share or interest and the defendant cannot take advantage of it, at the trial, but must plead it in abatement. *Whootwright v. Depcyster*, 1 *Johns. Rep.* 471.

In *trespass* against three defendants, two were taken, and the other returned not found. The plaintiff declared against the two, in Court, *simul cum* the other; the two defendants pleaded the general issue, not guilty, and the jury found a verdict of not guilty. The defendants moved in arrest of judgment, on the ground that the plaintiff could not proceed until all the defendants were brought into Court. But it was held that the torts being *joint* and *several*, the plaintiff might at his election proceed against one or more of the defendants. *Rose v. Oliver et al.* 2 *Johns. Rep.* 365. *Lanning v. Montgomery*, *ibid.* 382. *Bishop v. Ely et al.* 9 *Do.* 294. *Low v. Mumford*, 14 *Do.* 426. *Sutton v. Clarke*, 6 *Tunst. Rep.* 99.

But there is a distinction between personal actions of *tort*, and such actions when they concern *real property*. Therefore if one tenant in common only be sued in *trespass*, *trover*, or *cave*, for any thing respecting the land held in common, he may plead the tenancy in common in abatement. *Vide* 1 *Saund. Rep.* 291. *c. Thomson et al. v. Hopkins et al.* 11 *Mass. Rep.* 419.

But this rule does not apply where the title of land cannot come in question; thus where the Act complained of, consists of *malfeasance*. *Vide* *Low v. Mumford*, 14 *Johns. Rep.* 426.

Part II.
Plea in
abatement.

Bench, that where a person is sued merely on a common law duty, as a carrier on the custom of the realm, &c. it is no answer for him to say, that another person was jointly liable with him (1) It was before held, that in actions founded on a mere tortious act or trespass committed by several, there can be no such plea, for each *tortfeasor* is separately liable. (2) (o)

In actions, however, founded on a mere contract brought

(1) Ansell v. Waterhouse, K. B. Trinity, 57 Gr. 3. Vide Cooper v. Smith, 4 Taunt. 802.

(2) Powell v. Layton, 2 N. Rep. 365. Where there are several tenants in common, and all do not join in an action of *trespass quare clausum fregit*, the defendant cannot take advantage of it at the trial, but must plead it in abatement. *Brotherton et al. v. Hodges et al.* 6 Johns. Rep. 108. *S. P. Bradish v. Schenk*, 3 Do. 151. *Austin et al. v. Hall*, 13 Do. 236. *Law v. Mumford*, 14 Do. 426.

But in *Watson et ux. v. King*, 4 Campb. Rep. 272, Lord ELLENBOROUGH held, that trover was maintainable for three-fourths of a ship.

That the *assumpsit* was made by the defendant and one of the plaintiffs jointly, must be pleaded in abatement. *Robinson v. Fisher*, 3 Caines' Rep. 99.

Where the defendant promised to pay each of several partners his specific proportion of the debt, in an action by one of them for his proportion, the defendant cannot object to the nonjoinder of the others. *Burns v. Morris*, 3 Caines' Rep. 54.

In *assumpsit*, the joinder, as defendants of parties who did not join in the promise, need not be pleaded in abatement, but may be taken advantage of under the general issue. *Town v. Goodrich*, 2 Johns. Rep. 213.

But a suit on a *joint and several bond*, must be brought either against all the obligors jointly, or one of them singly, and not against any intermediate number; and if an error in this respect appear on the record, the judgment will be reversed, though it had not been pleaded in abatement. *Lefschich v. Berkeley*, 1 Hen. & Munf. Rep. 62.

In a suit on a bond against five obligors, the sixth being omitted; it appearing from the narr. they were securities for him; but it not being alleged that he had sealed the bond, and no plea in abatement having been filed, the Court, after verdict for the plaintiff, will presume the obligor not named to be dead, though it be not so stated in the narr. *Winslow v. The Commonwealth*, 2 Hen. & Munf. Rep. 459.

But where one obligor of a bond is sued, it must be pleaded in abatement, and cannot be taken advantage of on the production of the instrument at the trial. — *Adms. of Kenon*, 1 Hayw. Rep. 216.

Where the assignees of a bankrupt partner bring a suit for a partnership debt, and there is no plea in abatement, they are entitled to recover a moiety. *Barclay's assignees v. Carson*, 2 Hayw. Rep. 243. Et vide *Hastler's exrs. v. Skull*, Tait. Rep. 152.

If one joint tenant or tenant in common sue for the whole land, and only prove himself entitled to one-third, he shall not at the trial be nonsuited, but shall have a verdict for such a part as he proves his title to. *M. Fadden v. Haley*, 2 Bay's Rep. 457. *Middleton v. Perry*, *ibid.* 539 — AM. Ed.

(o) If separate suits be brought against several defendants, for a joint trespass, the plaintiff may recover separately against each, but he can only have one satisfaction. *Livingston v. Bishop*, 1 Johns. Rep. 289.

Vide *Knox v. Work*, 1 Browne's Rep. 101. *Ammonett v. Harris*, 1 Hen. & Munf. Rep. 438. *Wilkes v. Jackson*, 2 Do. 355. Et vide *Rubble v. Turner*, 2 Hen. & Munf. Rep. 38. — AM. Ed.

against several persons, the plaintiff on the general issue must recover against all or none, and this whether he declares in *assumpsit* or *tort*; and therefore if a declaration in *tort* allege a deceit to have been effected on the plaintiff by means of a warranty made by two defendants upon a *joint sale* by them both, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only. On the contrary where the *tort* or negligence, and not the mere breach of contract, is the ground of action; as where several being employed to remove a hogshead of wine for certain reward to be paid to one, and certain other reward to be paid to the others; the wine was spilt by negligence, and an action in *tort* was brought against all, there the Court held that one only might be found guilty, and the others acquitted.

Ch. I.
Pless in
abatement.

Weal v. King,
12 East, 452.

Govett v.
Radnidge,
3 East, 62.

Sed vide Weal
v. King, su-
pra; and Max
v. Roberts, 2
N. Rep. 454,
and 12 East,
89.

CHAP. II.

OF THE EVIDENCE IN ACTIONS OF ASSUMPSIT.

Part II. THE action of *assumpsit* takes the largest range of all those which are founded on contract; for whatever duty arises from the acts of the parties without any actual contract between them, from a parol agreement, or from a contract in writing not under seal, the performance of it is properly enforced by this species of action.(a)

(a) In an action of *assumpsit*, the promise is the *gist* of the action, and cannot be cured even by verdict. *Winston v. Francisco*, 2 Wash. Rep. 137.

In an action upon a note of hand, there must be an express *assumpsit* laid in the narr. and merely reciting the note of hand in *hec verba*, will not be sufficient. *Cooke v. Simms*, 2 CalP's Rep. 239.

Assumpsit will not lie on a policy of insurance of a corporate body, (being under seal) unless a new consideration be averred. *Mar. Ins. Co. of Alexandria v. Young*, 1 Cranch's Rep. 332.

If *A.* agrees by contract under seal, to do certain work for *B.* and does part, and is prevented by *B.* from finishing it according to the contract, *A.* cannot maintain an action of *assumpsit* for the work actually performed, but must sue upon the sealed instrument. *Young v. Preston*, 4 Cranch's Rep. 239.

But an action of *assumpsit* will lie on a parol agreement, made subsequent to one under seal, even though it altered the terms of agreement. *Baird v. Blaisgrove*, 1 Wash. Rep. 170.

The maxim of *minimis non curat lex*, does not apply to money due from one another, however small the sum; a creditor is entitled to an action if but for a single cent. *Boyden v. Moore adm.* 5 Mass. Rep. 365.

Where a penalty is given by a Statute, and an action on the case is provided for its recovery, an action on the case for a *tert* is intended, and not in *assumpsit*; for no *assumpsit* is implied. *Peabody v. Hoyt*, 10 Mass. Rep. 36.

1. What is a sufficient consideration for an *assumpsit*.

A moral or equitable obligation is a sufficient consideration for an *assumpsit*. *Clark v. Herring*, 5 Binn. Rep. 33. *Forester v. Fuller*, 6 Mass. Rep. 58.

Quere, Whether a moral obligation will support an action on an implied *assumpsit*. *Overseers of Tioga v. Overseers of Seneca*, 14 Johns. Rep. 390.

A promise deliberately made, although without any consideration, if it shall induce a third person from the confidence he reposed in it, to part with his property, is binding. *Wilson v. Clements*, 3 Mass. Rep. 1.

Forbearance to sue is a sufficient consideration for a promise to pay the debt of another. *Etting v. Vanderlyn*, 4 Johns. Rep. 237.

To make a consideration sufficient in law for supporting an *assumpsit*, there must be some benefit arising to the defendant, or some injury or loss to the plaintiff.—*Hamaker v. Eberly*, 2 Binn. Rep. 509.

Where the interest of a man is promoted, though not at his request, and he after-

The plea of *non assumpsit* putting the whole case in issue, makes it incumbent on the plaintiff to prove all the circumstances stated in his declaration. In this action, therefore, if the plaintiff allege any fact by way of consideration for the promise on which the action is founded, or the performance of any

wards deliberately engages to pay, his promise will bind him. *Greeves v. M^r Allister*, 1 *Brown's Rep.* 111. *S. C. & Binn. Rep.* 591.

The old rule that an action will not lie where the consideration is *past*, has received a rational explanation from modern Courts of Justice. Though the service has been rendered *prior* to the promise, yet if the party lie under a *legal or moral* obligation to pay, the promise will bind him. *ibid.*

If a person through a misapprehension of the law, acknowledge himself under an obligation which the law will not impose on him; or promise to pay money from which he is discharged by law, he shall not be bound. *Warder et al. v. Tucker*, 7 *Mass. Rep.* 449. *Freeman et al. v. Boyerton*, *ibid.* 483. *Pearson v. Lord*, 6 *Do.* 81. *May v. Coffin*, 4 *Do.* 341. *Garland v. The Salem Bank*, 9 *Do.* 408.

But if a person promise to pay a debt from which he is discharged under a commission of bankruptcy, the promise will revive the original cause of action, and be a sufficient answer to the discharge. *Maxim v. Morse*, 8 *Mass. Rep.* 127.

2. *Assumpsit for work, labour, and services.*

Where services are rendered merely in *expectation* of a legacy, *without any contract*, express or implied, an action for services cannot be maintained against the executors. *Little v. Dawson et al.* 4 *Dall. Rep.* 111.

But if *at the request* of the testator, it will. *Roberts v. Swift et al.* 1 *Yeates' Rep.* 209.

And whether the promise was *before or after* the services. *Snyder v. Castor*, 4 *Yeates' Rep.* 253.

An action lies by an illegitimate child against the administrators of his putative father, on a promise of the intestate, made in consideration of services. *Conrad v. Conrad*, 4 *Dall. Rep.* 130.

3. *Assumpsit for use and occupation.*

In *assumpsit* for use and occupation, the plaintiff must prove a contract, but the proof may be either *direct or presumptive*. If he prove that the defendant occupied the land by his permission, the law will imply a promise to pay a reasonable rent. *Hemwood v. Cheeseman*, 3 *Serg. & Rep.* 500.

But if defendant came in as a *trespasser*, the plaintiff cannot recover in this action. *ibid.*

Assumpsit is founded on *privity of contract*,—not privity of estate. *ibid.*

4. *Assumpsit for money had and received.*

The action for money had and received is a liberal kind of action, and will lie in cases where, by the ties of natural justice and equity, the defendant ought to refund the money paid to him; but where the party might, with good conscience, receive the money, and there was no deceit or unfair practice in obtaining it, although it was money which the party could not recover by law, the action has never been so far extended as to enable the party who paid the money voluntarily, to recover it back. *Morris v. Farin*, 1 *Dall. Rep.* 148. *Bulow v. Goddard*, 1 *Nott & M^c Cord's Rep.* 54.

Part. II. act which was necessary to be done by him previous to his calling on the defendant to complete his part of the contract, he is obliged to prove it.

SECTION I.

Evidence in actions on written contracts.

Ch. II. s. 1. If the contract be in writing, the hand writing of the party against whom it is to be given in evidence, must be proved either by the subscribing witness, or by the means before pointed

Vide ante,
146.

It would seem that in this action, it must be *expressly proved* that money has come to the defendant's hands. *Haskins v. Dunham*, 1 *Anth. N. P. Cas.* 52. *Parker's exr. v. Fasset's exr.* 1 *Har. & Johns Rep.* 337. (See vide 2 *Brod. & Bing. Rep.* 369. *Schee v. Hassinger*, 2 *Binn. Rep.* 325.)

The distinction between *specific* property, and *money* is well established; in the one case, the true owner will have a right to recover it from any person found in possession of it; but in the case of money, to enable the party to recover, there must be some *privity* between the owner and receiver, or there must be *mala fides*, an unjust receipt of the money, or at least a receipt of it, without a valuable consideration. *Rapelje et al. v. Emory*, 2 *Dall. Rep.* 54.

In an action of *assumpsit* for money had and received, the plaintiff waives all *torts* and special damages, and goes only for the money received, and so far confirms the defendant's acts as that he cannot gainsay his right to receive it. *Eastwick v. Hugg*, 1 *Dall. Rep.* 229.

Assumpsit does not lie to recover back money received under a judgment in a foreign attachment laid in a foreign country, however erroneous the decision may be. *Rapelje v. Emory*, 2 *Dall. Rep.* 231, *S. C.* by name of *Messier v. Armory*, 1 *Yeate's Rep.* 533. Vide *Wright v. Towers*, 1 *Browne's Rep.* app. 1.

It will lie in favour of one, who has improperly paid the defendant money. *The Union Bank v. The United States Bank*, 3 *Mass. Rep.* 74. *Green v. Stone*, 1 *Har. & Johns Rep.* 405.

Where the goods of one man are seized and sold by the Sheriff, for the debt of another, I have but little doubt but that the person whose goods are unjustly sold may waive the *tort*, and bring *assumpsit* against the plaintiff in the original suit, for the proceeds which have come to his hands. Per *YEATES J.* *Bank of N. America v. McCall*, 4 *Binn. Rep.* 374. Et vide *Cummings et ux. v. Noyes*, 10 *Mass. Rep.* 433.

Assumpsit will lie to recover money paid to another, as the plaintiff's agent. *Floyd v. Day*, 3 *Mass. Rep.* 403.

It will lie on an express promise to pay the factor of any one for the use of the principal, where the suit is brought by the factor. *Van Staphoret v. Pearce*, 4 *Mass. Rep.* 259.

Where money was awarded by commissioners between *Great Britain* and the *United States*, to be paid over to those interested, and among others a sum was awarded nominally to one, the interest of which was in another, it will lie in favour of that other so entitled. *Heard v. Bradford*, *ibid.* 326.

out, and care should be taken that a proper agreement stamp is impressed upon it, otherwise it will not be admitted in evidence for the purpose of proving a contract, or the terms of it; and even if the party against whom it is offered in evidence, has wrongfully destroyed it before it has been stamped, no parol

Ch. II. s. 1.
Stamp duties.

So where a surety has paid the debt of the principal. *Bunce v. Bunce*, *Kirb. Rep.* 137.

For money paid by mistake in a settlement of accounts. *Sage v. Aloop*, 1 *Root's Rep.* 143.

So for the rents and profits of land. *Rogers v. Tracey*, *ibid.* 233. Et vide *Hal-dane et al. v. Duche's exrs.* 2 *Dall. Rep.* 176. *S. C.* 1 *Yeates' Rep.* 121.

An action of *special indebitatus assumpsit*, will lie for public securities, which are mortgaged. *Whiting v. M'Donald*, 1 *Root's Rep.* 444.

So, for money received by the defendant, and by him misapplied. *Ormesad v. Doty*, 2 *Root's Rep.* 184. *Dumond's admr. v. Carpenter*, 3 *Johns. Rep.* 183. *M'Kee v. Myers*, *Addis. Rep.* 31.

So, for the consideration paid where the party has not received the thing con-tracted for, but a different one of no value. *Sanford v. Dodd*, 2 *Day's Rep.* 437.

Where the defendant directed the plaintiff's servant to enter the ground of another, and promised to save him harmless, an action of *assumpsit* will lie to in-demnify the defendant. *Allaire v. Ouland*, 5 *Johns. Cas.* 52.

So, to recover back the consideration paid, where a person bound himself under hand and seal, to do a certain act and failed to perform it. *Weaver v. Beniley*, 1 *Caines's Rep.* 47.

So, by the owners of a ship, against the proprietors of the cargo, to recover their proportion of the general average. *Walden v. Le Roy*, *ibid.* 363.

Assumpsit will lie, on a parol promise made by one to another, in favour of a third, by such third person. *Schermorhorn v. Vanderheyden*, 1 *Johns. Rep.* 159.

If one party does not accede to the promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 *Johns. Rep.* 470.

Assumpsit is the proper action wherever there is a warranty express or implied, in the sale of chattels. *Exrs. of Evertson v. Miles*, 6 *Johns. Rep.* 138.

Assumpsit as well as *debt* lies on a foreign judgment. *Hubbell v. Cowdrey*, 5 *Johns. Rep.* 132.

It will lie in favour of the trustees of a town to recover damages, for the non-de-livery of papers, records, &c. belonging to the corporation. *Trustees of Paris v. Trustees of Paris*, *Hardin's Rep.* 456.

If a father holds the legal title of land in trust for his son, and they agree to sell it, and the father receives the purchase money, and promises to pay the debts of the son, a creditor of the son, who had previously obtained judgment against him, and levied on the land, may sustain *assumpsit* for money had and received against the father. *Fleming v. Alter*, 7 *Serg. & R. Rep.* 295.

But it will not lie for the price of sand taken from a sand-bart to which both plain-tiff and defendant claim title, and sold by defendant. *Baker v. Howell*, 6 *Do.* 476.

It will lie to recover a partnership debt against the executors of a deceased part-ner, the other partner being a certificated bankrupt. *Lang v. Keppele*, 1 *Binn. Rep.* 123.

Where a principal assigns a fund to trustees to pay a creditor, whom the surety afterwards pays, and the proceeds of the fund are afterwards paid over by the trustees, the surety may recover the same, in this action. *Miller et al. v. Ord et al.* 2 *Binn. Rep.* 382.

It lies for the non-performance of any promise or contract (not unlawful in it

Ch. II. s. 1.
Stamp duties.

(1) R pperer
v. Wright,
2 M. & S.
478.

evidence can be given of its contents.(1) But in a sessions case, where an agreement was made on unstamped paper, for the service of the pauper for a certain time, and the parties continued together for some time afterwards under a parol agreement, the Court of King's Bench held that the sessions might

self,) for a valuable consideration, when the non-performance may be beneficial to the defendant or prejudicial to the plaintiff. *Black v. Digge's exrs.* 1 Har. & M.H. Rep. 153.

So, upon a letter of credit in favour of him who trusts a third person upon the faith of that letter. *Lawrason v. Mason*, 3 Cranch's Rep. 492.

It will lie for and against an executor for a trespass by waiving the tort, and going for the value of the thing taken. *Middleton's exrs. v. Robinson*, 1 Bay's Rep. 58.

So, upon the sale of a debt or chose in an action, which will be a good ground for a consideration. *Parker v. Kennedy*, *ibid.* 432.

5. Assumpsit for money laid out, &c.

A surety who has paid the debt of his principal, may recover against the principal in general *indebitatus assumpsit* for money paid on an implied promise. *Hassinger v. Solms*, 5 Serg. & R. Rep. 9.

Although it was paid on a usurious contract, which the principal might have avoided. *Ford v. Keith*, 1 Mass. Rep. 139.

Money paid by mistake, may be recovered back in an action for money had and received. *Bond v. Hays exr.* 12 Mass. Rep. 34. *Garland v. The Salem Bank*, 9 Do. 408.

So, to recover back money paid on a consideration which has failed. *Spring et al. v. Coffin*, 10 Mass. Rep. 31.

Wherever money is paid on an illegal transaction, if the party paying the money be not equally guilty with the other; as if the latter has been taken advantage of, and oppressed the former, it may be recovered back in this kind of action. *The Inhabitants of Worcester v. Eaton*, 11 Mass. Rep. 363.

6. Pleadings and evidence in assumpsit.

An *assumpsit* will not lie on a promissory note under seal. *January v. Goodman*, 1 Dall. Rep. 208.

But a specialty received as collateral security for a simple contract debt, may be read in evidence in *assumpsit* on the original contract to ascertain the amount due. *Charles v. Scott*, 1 Serg. & R. Rep. 294.

In *assumpsit* for money had and received, deeds or other writings which are not the immediate foundation of the suit, but only leading to it, may be read to prove mistake, imposition, or deceit. *D'Utricht v. Melchon*, 1 Dall. Rep. 423. Sed vide *Weaver v. Bentley*, 1 Caines' Rep. 48.

In *assumpsit*, the plaintiff cannot give in evidence a specialty to prove his debt. 1 Moor's Rep. 340.

In an action for goods sold and delivered, evidence that the goods were not the property of the plaintiff, but belonged to a third person, is inadmissible. *Wright v. Sharp*, 1 Browne's Rep. 344.

In special *assumpsit*, the contract must be proved expressly as laid. *Anderson v. Hoyer*, 2 Yeates' Rep. 95.

In *indebitatus assumpsit*, the defendant may demand of the plaintiff to specify the nature of the evidence he means to offer; and until this is done the Court will not suffer the plaintiff to bring on the trial. *Kelly v. Foster*, 2 Binn. Rep. 7.

look at the paper for the purpose of seeing whether the time had expired.(1)

Part II.
Stamp duties.

In cases where a proper stamp has not been impressed, and only one part has been signed, which continues in the hands of the defendant, the Court in which the action is brought will

(1) *Rex v. Inhabitants of P. nleton*, 15 East, 449.

7. Where *assumpsit* will not lie.

An action of *assumpsit* will not lie on a charter party, under seal, where there has been no subsequent express promise. *Davis v. Gibson*, *Rep. in Ct. of Conf.* 102.

Even in the case of a sealed instrument, unattested by witnesses, an action of debt and not *assumpsit*, is the proper remedy. *Ingram v. Hall*, 1 *Hayw. Rep.* 193. See vide *Clements v. Eason*, *ibid.* 18.

It will not lie for that for which a judgment had already been obtained. *Tune v. Williams*, 1 *Hayw. Rep.* 18.

Nor to recover back money, where the parties are in *pari delicto*. *Gates v. Winslow*, 1 *Mass. Rep.* 65.

Nor against an officer for neglect or misbehaviour in office. *McMillan v. Eastman*, 4 *Mass. Rep.* 378.

Nor to recover the interest accruing on a judgment debt, during the suspension of the execution by the creditor. *Beedle v. Grant et al.* 1 *Tyl. Rep.* 433.

Nor on a judgment. *Vail v. Mumford*, 1 *Root's Rep.* 142.

Nor to recover back money recovered in a former suit. *Brunson v. Bacon*, *ibid.* 210. *Burbanks v. Lee*, *ibid.* 262. *Fitch v. Cort*, *ibid.* 266. *Bulkley v. Stewart*, 1 *Day's Rep.* 130.

Nor against an administrator for the debt of the intestate. *Aplin v. Robertson*, 1 *Root's Rep.* 235.

Nor against one who has received money as an agent and paid it over. *Bingham v. Tully*, *ibid.* 237. Et vide *Lyman et al. v. Edwards*, 2 *Day's Rep.* 153.

Nor by one partner against the other, upon their unliquidated accounts. *Dewitt v. Stanford*, 1 *Root's Rep.* 270. *Ozeas v. Johnson adm.* 4 *Dall. Rep.* 434. *S. C.* 1 *Binn. Rep.* 191. *Casey v. Brush*, 1 *Caines' Rep.* 293. *Beach v. Hotchkiss*, 2 *Con. Rep.* 425.

Nor upon a contract void in law. *Charles v. Hart*, 1 *Root's Rep.* 396.

Whether it will lie to recover back money paid, as the purchase money of real estate by false and fraudulent misrepresentations of title. *Young v. Kenyon*, 2 *Day's Rep.* 252.

It will not for money had and received, for money paid for land, where it was short of the quantity expressed in the deed. *Hewes v. Barker*, 3 *Johns. Rep.* 506.

Nor to recover back a sum of money paid to the defendant to induce him to comply with a previous agreement. *Hall v. Schultz et al.* 4 *Johns. Rep.* 240.

Where one of the obligees of a bond induced the plaintiff to pay it, he can have no claim on one who was a surety on such bond. *Elmendorph v. Tappen et al.* 5 *Johns. Rep.* 176.

It will not lie to recover money paid to the defendant since the bringing of the suit. *Ralston v. Bell*, 2 *Dall. Rep.* 242.

It will not lie against a corporation on an implied promise. *Breckhill v. Turnpike Co.* 3 *Dall. Rep.* 496. See contra, *Chester Hill Turnpike Co. v. Rutter*, 4 *Serg. & B. Rep.* 16. *The Bank of Columbia v. Patterson's adms* 7 *Cranch's Rep.* 299. *Dunn v. St. Andrews Church*, 14 *Johns. Rep.* 118.

Where goods are sold on a credit, *indebitatus assumpsit* does not lie to recover the price of them, until the term of credit has expired. *Girard v. Taggart et al.* 5 *Serg. & B. Rep.* 19.

A promise, without a consideration, is *nudum pactum*, although it be in writing. *The People v. Howell*, 4 *Johns. Rep.* 297. *Moseley v. Jones*, 5 *Mansf. Rep.* 23.—AM. EX.

Part II.
Stamp duties
on agree-
ments*

(1) Bateman
v. Phillips,
4 Taunt. 157.

make a rule on him to produce it at the stamp Office, for the purpose of being stamped at the expense of the plaintiff.(1)

By Statute 23 *Geo.* III, c. 58, s. 1, a stamp duty of 6s. is laid "on every skin or piece of vellum or parchment, or sheet or piece of paper upon which any agreement shall be engrossed, written, or printed, whether the same shall only be evidence of the contract, or obligatory upon the parties, from its being a written instrument;" and by subsequent Statutes additional duties are imposed.

The 4th section of the first Act provides that the duty shall not extend to any memorandums or agreements of the following description, viz.

1st. Any memorandum or agreement for any lease at rack rent, of any messuage under the yearly rent of 5*l*.

2d. For the hire of any labourer, artificer, manufacturer, or menial servant.

3d. For or relating to the sale of any goods, wares, or merchandises.

4th. Where the matter of memorandum or agreement shall not exceed the sum of 20*l*.

5th. Or any memorandum or agreement made in Scotland, that shall be stamped with the duty required on deeds in Scotland.

A further provision is made by the Statute 32 *Geo.* 3, c. 51, by which it is enacted that the duty shall not extend to any letter or letters passing by the post between merchants or other persons carrying on trade or commerce in this kingdom, and residing at the distance of fifty miles from each other, for or by reason of such letter or letters containing an agreement in respect to any merchandise, notes, or bills of exchange, or evidence of such an agreement; but that such letter or letters may be evidence of such agreement as aforesaid, though the same be not stamped.

But it is provided that this last Act shall not extend to any letter or correspondence passing between persons who are residents of the same town or city, nor to any letter or correspondence written, or so passing between persons not at the time of writing or sending thereof at the actual distance of fifty miles from each other.*

* By 44 *Geo.* 3, c. 91, schedule (A) the old duty is repealed, and a duty of 16s. imposed, where the length of the agreement does not amount to thirty common law sheets; and for every entire quantity of fifteen common law sheets, a further duty of 16s. The same exemptions are continued as are contained in the Stat. 23

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1. 2



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1. **Introduction**

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Part II.
Stamp duties.

- deemed an agreement amounting to 20*l*. it has been held, that if a man at a sale of growing turnips purchase several lots, none of which alone amounts to 20*l*. though altogether they would exceed that sum, the agreement need not be stamped, though it would be liable for any one amounting to 20*l*. as being an interest in the land, and not a mere sale of goods.(1) On the like principle it was determined, where two men having laid a wager, afterwards agree to double it, that to recover the double amount two stamps should be impressed on the paper, each being separate transactions.(2)
- (1) *Ibid*.
On the Act of the 32 *Geo*. 3, it has been holden, that if a son, managing his mother's trade, write a letter to a creditor residing above fifty miles from him, thereby promising to pay the debt, such letter is exempted, as being between two persons carrying on trade.(3)
- (2) *Robson v. Hall, Peske's N. P. Cas.* 127.
Where a paper writing is signed by several persons, each agreeing for himself only, it is as several agreements, and requires several stamps? but if only one stamp be impressed, and it appear that such stamp was put on for the purpose of making it binding on any one individual, it will be evidence against him, though there are no stamps to make it evidence against the others;(4) and where several enter into an agreement to subscribe for a certain purpose, it is but one agreement for the purpose of the stamp duty, though several as to each.(5)
- (3) *Mackenzie v. Banks,* 5 *T. Rep.* 176.
Several cases have arisen in which it has become a question how far the alteration of an instrument, after it has been stamped, affects the stamp so as to render a fresh one necessary. The general rule which has been laid down is, that if the alteration is merely to correct a mistake in the agreement and to carry into effect the original intention of the parties, no new stamp is necessary; but where a new term is added, and in fact a new agreement made, such new agreement will not be valid till re-stamped. Thus it has been held, that adding the words "or order," which had been accidentally omitted in a bill of exchange;(6) or turning a promissory note into a bill, as originally agreed upon;(7) or altering the name of the port from whence the certificate of a ship's registry was granted, when a wrong port had been inserted by mistake;(8) or rectifying the name where a mistake was made in declaring the interest on a policy,(9) does not render a fresh stamp necessary. So(10) where an umpire, having made his award, altered the sum after the expiration of the time for publishing it, the Court held that the alteration being a mere nullity, the award as at first made might
- (4) *Doe dem Copley, bart. v. Day,* 13 *East*, 241.
(5) *Davies v. Williams,* 13 *East*, 232.
(6) *Kershaw v. Cox,* 3 *Esp* 246; cited 10 *East*, 424, and 15 *East*, 417.
(7) *Webbe v. Maddocks,* 3 *Campb.* 1.
(8) *Cole v. Parkin,* 13 *East*, 471.
(9) *Robinson v. Tournay,* 1 *M. & S.* 317.
(10) *Henfree v. Bromley,* 6 *East*. 309.

be enforced. But where the defendant having subscribed a policy of assurance, which in the printed part was *on ship and goods*, but by a written note in the margin was restrained to *ship and out-fit*, a memorandum was afterwards inserted in the policy as follows, viz. "it is hereby agreed that the interest in this policy of insurance shall be on ship and goods, instead of ship and out-fit, as originally declared;" the Court held that the original risk being so altered the policy ceased to be a valid instrument, and that no action could be maintained upon it, either in its original or its altered form, until a new stamp was impressed upon it.⁽¹⁾ The like decision⁽²⁾ took place where a bill, having been drawn on a proper stamp at twenty-one days, was, while in the hands of the drawer, altered to fifty-one days by consent of all parties, and by the like consent was, after the time for payment was out, altered again to twenty-one days; it being considered that the time of payment being spent when the second alteration was made, it was a new instrument, and required a new stamp. So where⁽³⁾ a promissory note, being made payable as for "value received" generally, was, after it had been delivered, altered by adding the words "for the good will of a house in trade," this also was held to be such an alteration as to require a fresh stamp.

In two late cases the Court of King's Bench took a distinction between a paper *signed* by the agent of one of the parties, and by him delivered over to the other party, and an *unsigned* paper so delivered. And where lands were let by auction, and the auctioneer delivered to the bidder of one parcel, a written paper, "One piece of land, &c. for a term of ten years to Mr. W. T;" such paper not having any signature, it was held that it was neither an agreement, nor evidence of it, and therefore that parol evidence might be given of the letting;⁽⁴⁾ but where to a similar paper, delivered to another bidder, the auctioneer subscribed his name, the Court held that the paper was liable to a stamp duty, and that no parol evidence could be given without first producing the agreement.⁽⁵⁾

The Stamp Office having fixed upon different dies to denote the different denominations of stamps, no other but that appointed for the instrument which is to be produced in evidence, will be sufficient to give it validity. An agreement stamp will not do for a deed⁽⁶⁾ or lease though not under seal,⁽⁷⁾ though of equal value. But by Statute 37 Geo. 3, c. 146, instruments on stamps of different denominations, but of greater or equal value

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(1) French v. Patten, 9 East, 351.

(2) Bowman v. Niebol, 5 T. Rep. 537.

(3) Knill v. Williams, 10 East, 431.

(4) Ramabottom v. Tambridge, 2 M. & S. 434.

(5) Same v. Mortley, ibid. 445.

(6) Robinson v. Drybrough, 6 T. Rep. 317.

(7) Semb. Goodtitle dem. Eastwick v. Way, 1 T. Rep. 735. Vide post.

Part II.
Statute of
Frauds.

than the proper stamp, may, on payment of the duty, and 5*l.* penalty, be stamped with the proper stamp.

Instruments unstamped, or on stamps of less value, may be stamped on payment of the duty, and 10*l.* penalty for each skin; and if written on unstamped paper, and it shall appear to the commissioners by oath or affirmation, that it was so written by accident, inadvertency, urgent necessity, or unavoidable circumstances, and without intention of fraud; the commissioners are authorised, within sixty days after the making of the instrument, to remit the penalty, or such part as they may deem proper.*

Bills of exchange and promissory notes are excepted from the operation of these clauses, being provided for in a manner of which I shall hereafter take notice.

Sect. 4. By the rules of the common law every contract might be proved by parol evidence; but by the Statute 29 *Car. 2, c. 3*, commonly called the Statute of Frauds, it is enacted, That no action shall be brought whereby,

1. To charge any executor or administrator, upon any special promise, to answer damages out of his own estate.

2. Or to charge the defendant to answer for the debt, default, or miscarriage of another.

3. Or to charge any person upon any agreement made in consideration of marriage.

4. Or upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning the same.^(b)

Sect. 17. 5. Or upon any agreement that is not to be performed within one year from the making thereof, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised.

And further, That no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest, to bind the bargain, or in part of payment; or that some note or memorandum, in writing, of the said *bargain*,

* The Statute 44 Geo. 3, c. 98, s. 24, grants a similar indulgence in case the instrument be brought to the office within twelve months.

(b) A parol gift of land in fee, creates only a tenancy at will. *Jackson ex. d. Van Allen v. Rogers*, 2 *Caines' Cas. in Er.* 314.

be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.(c):

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The first provision of this Statute as to executors, &c. is so

(c) The Statute of Frauds was made to prevent frauds, and should be expounded liberally and beneficially for that purpose. *Thompson's les. v. White*, 1 *Dall. Rep.* 424.

Under the Statute in *Pennsylvania*, "for the prevention of frauds and perjuries," (1 *Sm. L.* 389,) which omits the provision contained in the 4th sect. of the Statute 29 *Car. 2*, c. 3, an action for damages may be maintained on a parol contract for the sale of land, or on a written contract with an agent who has only a parol authority. *Ewing v. Tees*, 1 *Binn. Rep.* 450. *Bell v. Andrews*, 4 *Dall. Rep.* 152.

The Act of Assembly does not make a parol sale of land void; though it restricts the operation of the agreement, as to the acquisition of an interest in the land, and no title in fee simple can be derived under it. *ibid.*

But an action will lie to recover damages for the non-performance of such an agreement. *ibid.*

A Court of Equity will not compel the specific performance of a parol agreement to convey lands, in a case where the party who asks its assistance is chargeable with unfair conduct, in relation to the contract which he seeks to enforce, but will turn him away from that form, and leave him to his legal remedy. *Thompson v. Tod*, 1 *Peters' Rep.* 380.

There is nothing in this Act to prevent a declaration of trust by parol. *Les. of German et al. v. Gabbald*, 3 *Binn. Rep.* 302.

A parol partition between tenants in common, made by marking a line of division on the ground, and followed by a corresponding separate possession is good, notwithstanding the Act of *Sept. March*, 1773. *Ebert v. Wood*, 1 *Binn. Rep.* 216.

For a parol gift of lands, *vide Les. of Syler v. Eckhart*, 1 *Binn. Rep.* 378. *Et vide Les. of Billington v. Welch*, 5 *Do.* 129.

Supposing that possession alone is not sufficient to take a case out of the Statute, yet if part of the purchase money be paid, and the possession be delivered in pursuance of, and with a view to the performance of the contract, it is sufficient. *Bassler v. Nisely*, 2 *Serg. & R. Rep.* 352.

It is not every act that will take a case out of the Statute. *Jones v. Peterman et al.* 3 *Serg. & R. Rep.* 543.

It is now the settled rule, that although the defendant should answer and admit the contract as stated in the bill, he may nevertheless protect himself against a performance by pleading the Statute. *Thompson v. Tod*, 1 *Peters' Rep.* 388.

The defendant cannot take advantage of the Statute of Frauds, on a general demurrer, as the plaintiff may have a note or memorandum in writing, which he might produce in evidence. *Clark v. Brown*, 1 *Root's Rep.* 77. *Seymour v. Mitchell*, 2 *Do.* 143.

The Statute of Frauds does not require the agreement to make a conveyance of lands, to be set forth in the narr. *Miller v. Drake*, 1 *Caines' Rep.* 45.

The same rule is extended to an action on a promise to pay the debt of another. *Elting et al. v. Vanderlyn*, 4 *Johns. Rep.* 237.

The Statute of Frauds does not include a covenant to pay the debt of another being under seal. *Livingston v. Tremper*, 4 *Do.* 416.

In *Chancery*, the Statute of Frauds, will avail the defendant, though it be not formally pleaded. *Routon v. Routon*, 1 *Hen. & Munf. Rep.* 91.

The Statute applies as well to executory as executed contracts. *Bennett v. Hull*, 10 *Johns. Rep.* 364.

Consideration money paid, possession taken, and valuable improvements made, under a parol contract for the conveyance of lands, will, in equity, take a case out

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The distinction between *specific* property, and *money* is well established; in the one case, the true owner will have a right to recover it from any person found in possession of it; but in the case of money, to enable the party to recover, there must be some *privity* between the owner and receiver, or there must be *mala fides*, an unjust receipt of the money, or at least a receipt of it, without a valuable consideration. *Rapelje et al. v. Emory*, 2 *Dall. Rep.* 54.

In an action of *assumpsit* for money had and received, the plaintiff waives all *torts* and special damages, and goes only for the money received, and so far confirms the defendant's acts as that he cannot gain any right to receive it. *Eastwick v. Hugg*, 1 *Dall. Rep.* 222.

Assumpsit does not lie to recover back money received under a judgment in a foreign attachment laid in a foreign country, however erroneous the decision may be. *Rapelje v. Emory*, 2 *Dall. Rep.* 331, *S. C.* by name of *Messier v. Armory*, 1 *Yeates's Rep.* 533. Vide *Wright v. Towers*, 1 *Browne's Rep.* app. 1.

It will lie in favour of one, who has improperly paid the defendant money. *The Union Bank v. The United States Bank*, 3 *Mass. Rep.* 74. *Green v. Stone*, 1 *Hur. & Johns. Rep.* 405.

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Where money was awarded by commissioners between *Great Britain* and the *United States*, to be paid over to those interested, and among others a sum was awarded nominally to one, the interest of which was in another, it will lie in favour of that other so entitled. *Heard v. Bradford*, *ibid.* 326.

out, and care should be taken that a proper agreement stamp is impressed upon it, otherwise it will not be admitted in evidence for the purpose of proving a contract, or the terms of it; and even if the party against whom it is offered in evidence, has wrongfully destroyed it before it has been stamped, no parol

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So where a surety has paid the debt of the principal. *Bunce v. Bunce*, *Kirb. Rep.* 137.

For money paid by mistake in a settlement of accounts. *Sage v. Alsop*, 1 *Root's Rep.* 143.

So for the rents and profits of land. *Rogers v. Tracey*, *ibid.* 233. Et vide *Haldane et al. v. Duche's exrs.* 2 *Dall. Rep.* 176. *S. C.* 1 *Yeates' Rep.* 131.

An action of *special indebitatus assumpsit*, will lie for public securities, which are mortgaged. *Whiting v. M'Donald*, 1 *Root's Rep.* 444.

So, for money received by the defendant, and by him misapplied. *Ormetead v. Doty*, 2 *Root's Rep.* 181. *Dumond's admr. v. Carpenter*, 3 *Johns. Rep.* 183. *M'Kee v. Myers*, *Addis. Rep.* 31.

So, for the consideration paid where the party has not received the thing contracted for, but a different one of no value. *Sanford v. Dodd*, 2 *Day's Rep.* 437.

Where the defendant directed the plaintiff's servant to enter the ground of another, and promised to save him harmless, an action of *assumpsit* will lie to indemnify the defendant. *Allaire v. Ouland*, 5 *Johns. Cas.* 52.

So, to recover back the consideration paid, where a person bound himself under hand and seal, to do a certain act and failed to perform it. *Weaver v. Beniley*, 1 *Caines's Rep.* 47.

So, by the owners of a ship, against the proprietors of the cargo, to recover their proportion of the general average. *Walden v. Le Roy*, *ibid.* 363.

Assumpsit will lie, on a parol promise made by one to another, in favour of a third, by such third person. *Schermerhorn v. Vanderheyden*, 1 *Johns. Rep.* 159.

If one party does not accede to the promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 *Johns. Rep.* 470.

Assumpsit is the proper action wherever there is a warranty express or implied, in the sale of chattels. *Exrs. of Everton v. Miles*, 6 *Johns. Rep.* 138.

Assumpsit as well as *debt* lies on a foreign judgment. *Hubbell v. Cowdrey*, 5 *Johns. Rep.* 132.

It will lie in favour of the trustees of a town to recover *damages*, for the non-delivery of papers, records, &c. belonging to the corporation. *Trustees of Paris v. Trustees of Paris*, *Hardin's Rep.* 456.

If a father holds the legal title of land in trust for his son, and they agree to sell it, and the father receives the purchase money, and promises to pay the debts of the son, a creditor of the son, who had previously obtained judgment against him, and levied on the land, may sustain *assumpsit* for money had and received against the father. *Fleming v. Alter*, 7 *Serg. & R. Rep.* 295.

But it will not lie for the price of sand taken from a sand-bar to which both plaintiff and defendant claim title, and sold by defendant. *Baker v. Howell*, 6 *Do.* 476.

It will lie to recover a partnership debt against the executors of a deceased partner, the other partner being a certificated bankrupt. *Lang v. Keppeler*, 1 *Binn. Rep.* 123.

Where a principal assigns a fund to trustees to pay a creditor, whom the surety afterwards pays, and the proceeds of the fund are afterwards paid over by the trustees, the surety may recover the same, in this action. *Miller et al. v. Ord et al.* 2 *Binn. Rep.* 382.

It lies for the non-performance of any promise or contract (not unlawful in it

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other benefit, for the satisfaction of which it is intended as a security.

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Thus, if one man request another to supply goods to a third

the partition, will be valid and binding on the parties. *Jackson ex d. Duncan et al. v. Harder*, 4 Johns. Rep. 202.

Where lands were sold and conveyed by deed, describing their metes and bounds, with the supposed quantity, with a verbal promise at the same time, to pay the grantee all they fell short on mensuration; such promise was held to be void. *Brudley et al. v. Blodget*, Kirb. Rep. 22. *Northrop v. Speary*, 1 Day's Rep. 23.

Yet in another case, in the same State, a parol promise to pay or discount for what a tract of land shall fall short of the quantity stated in the deed, was held to be valid. *Mott v. Hurd*, 1 Root's Rep. 73.

A parol promise to convey lands, in consideration of a promise to pay for them, is void by the Statute of Frauds. *Tainter v. Brockway*, *ibid.* 59. *Janes v. Finney*, *ibid.* 549.

An agreement to convey lands, cannot be proved by parol evidence, nor an agreement to forfeit a certain sum, upon a failure to execute an agreement to be proved by parol evidence. *Goodrich v. Nicholls*, 2 Root's Rep. 498.

A parol gift of land creates only a tenancy at will. *Jackson ex d. Van Allen v. Rogers*, 1 Johns. Cas. 33. 2 N. York Cas. in Er. 314.

A sale of lands (in New York) by the Loan Officers, at auction, is within the Statute of Frauds. *Jackson ex d. Ec. v. Bull*, 2 N. York Cas. in Er. 301.

So a sale by a Sheriff, is within the Statute. *Simonds v. Catlin*, 2 Caines' Rep. 61.

Such a sale requires a deed or note in writing, specifying with certainty, the land sold. *Jackson ex d. Gratz et al. v. Catlin*, 2 Johns. Rep. 248.

Where L. wrote his name, and affixed his seal on the back of the lease, and it was agreed that C. should write an assignment over the signature and seal for the absolute conveyance of the lease to T. and should keep the lease a certain time, and C. afterwards wrote an assignment and delivered the lease to T. it was held that affixing the hand and seal to a blank paper was not a note in writing within the Statute of Frauds. *Jackson ex d. Lloyd v. Titus*, *ibid.* 430.

A right to erect mill-dams so as to overflow other lands, if it be not an incorporeal hereditament, cannot pass by parol since the Statute of Frauds. *Thompson v. Gregory*, 4 Johns. Rep. 81.

A promise merely by parol, by an owner, to sell lands to one who had settled on and improved them, is void. *Frear v. Hardenberg*, 5 Johns. Rep. 272.

In the case of a sale of lands by an agent, and a proposed purchase through an agent, their agreements cannot be the foundation of a suit in Chancery if they have no note in writing. *Buck v. Copland*, 2 Call. Rep. 218.

An agreement for the sale of lands perfected by the execution of conveyances, may be altered where there is some note or memorandum in writing made pursuant to the Statute of Frauds at the time or after the execution of such conveyances, whereby it appears that the parties had agreed to some further explanation or modification of the terms of agreement as therein expressed. *Vance v. Walker*, 3 Hen. & Munf. Rep. 288.

But the Statute will not prevent the recovery of the rents and profits of lands, they not being interest in the lands. *Rogers v. Tracy*, 1 Root's Rep. 233. *Wells v. Deming*, *ibid.* 149.

So, the sale of a crop of wheat which is growing, by a parol agreement, is valid notwithstanding the Statute. *Newcomb et al. v. Ramer*, 2 Johns. Rep. 421.

So, also is a right to cut and clear away trees on the plaintiff's farm. *Forbes v. Hamillon*, 2 Tyl. Rep. 356.

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So, for money received by the defendant, and by him misapplied. *Ormetead v. Doty*, 3 *Root's Rep.* 184. *Dumond's admr. v. Carpenter*, 3 *Johns. Rep.* 183. *M'Kee v. Myers*, *Addis. Rep.* 31.

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Where the defendant directed the plaintiff's servant to enter the ground of another, and promised to save him harmless, an action of *assumpsit* will lie to indemnify the defendant. *Allaire v. Ouland*, 5 *Johns. Cas.* 52.

So, to recover back the consideration paid, where a person bound himself under hand and seal, to do a certain act and failed to perform it. *Weaver v. Beniley*, 1 *Caines's Rep.* 47.

So, by the owners of a ship, against the proprietors of the cargo, to recover their proportion of the general average. *Walden v. Le Roy*, *ibid.* 363.

Assumpsit will lie, on a parol promise made by one to another, in favour of a third, by such third person. *Schermohorn v. Vanderheyden*, 1 *Johns. Rep.* 159.

If one party does not accede to the promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 *Johns. Rep.* 470.

Assumpsit is the proper action wherever there is a warranty express or implied, in the sale of chattels. *Exrs. of Evertson v. Miles*, 6 *Johns. Rep.* 138.

Assumpsit as well as *debt* lies on a foreign judgment. *Hubbell v. Cowdrey*, 5 *Johns. Rep.* 132.

It will lie in favour of the trustees of a town to recover damages, for the non-delivery of papers, records, &c. belonging to the corporation. *Trustees of Paris v. Trustees of Paris*, *Hardin's Rep.* 456.

If a father holds the legal title of land in trust for his son, and they agree to sell it, and the father receives the purchase money, and promises to pay the debts of the son, a creditor of the son, who had previously obtained judgment against him, and levied on the land, may sustain *assumpsit* for money had and received against the father. *Fleming v. Alter*, 7 *Serg. & R. Rep.* 395.

But it will not lie for the price of sand taken from a sand-bar to which both plaintiff and defendant claim title, and sold by defendant. *Baker v. Howell*, 6 *Do.* 476.

It will lie to recover a partnership debt against the executors of a deceased partner, the other partner being a certificated bankrupt. *Lang v. Keppeler*, 1 *Binn. Rep.* 123.

Where a principal assigns a fund to trustees to pay a creditor, whom the surety afterwards pays, and the proceeds of the fund are afterwards paid over by the trustees, the surety may recover the same, in this action. *Miller et al. v. Ord et al.* 2 *Binn. Rep.* 382.

It lies for the non-performance of any promise or contract (not unlawful in it

Part. II. act which was necessary to be done by him previous to his calling on the defendant to complete his part of the contract, he is obliged to prove it.

SECTION I.

Evidence in actions on written contracts.

Ch. II. s. 1. If the contract be in writing, the hand writing of the party against whom it is to be given in evidence, must be proved either by the subscribing witness, or by the means before pointed

Vide ante,
146.

It would seem that in this action, it must be *expressly proved* that money has come to the defendant's hands. *Haskins v. Dunham*, 1 *Auth. N. P. Cas.* 52. *Parker's exr. v. Fassett's exr.* 1 *Hur. & Johns. Rep.* 337. (See vide 2 *Brod. & Bing. Rep.* 369. *Schee v. Hawsinger*, 2 *Binn. Rep.* 325.)

The distinction between *specific* property, and *money* is well established; in the one case, the true owner will have a right to recover it from any person found in possession of it; but in the case of money, to enable the party to recover, there must be some *privity* between the owner and receiver, or there must be *mala fides*, an unjust receipt of the money, or at least a receipt of it, without a valuable consideration. *Rapelje et al. v. Emory*, 2 *Dall. Rep.* 54.

In an action of *assumpsit* for money had and received, the plaintiff waives all *torts* and special damages, and goes only for the money received, and so far confirms the defendant's acts as that he cannot gain any right to receive it. *Eastwick v. Hugg*, 1 *Dall. Rep.* 232.

Assumpsit does not lie to recover back money received under a judgment in a foreign attachment laid in a foreign country, however erroneous the decision may be. *Rapelje v. Emory*, 2 *Dall. Rep.* 231, *S. C.* by name of *Messier v. Armory*, 1 *Yeate's Rep.* 533. Vide *Wright v. Towers*, 1 *Browne's Rep.* app. 1.

It will lie in favour of one, who has improperly paid the defendant money. *The Union Bank v. The United States Bank*, 3 *Mass. Rep.* 74. *Green v. Stone*, 1 *Hur. & Johns. Rep.* 405.

Where the goods of one man are seized and sold by the Sheriff, for the debt of another, I have but little doubt but that the person whose goods are unjustly sold may waive the *tort*, and bring *assumpsit* against the plaintiff in the original suit, for the proceeds which have come to his hands. Per YATES J. *Bank of N. America v. McCall*, 4 *Binn. Rep.* 374. Et vide *Cummings et ux. v. Noyes*, 10 *Mass. Rep.* 433.

Assumpsit will lie to recover money paid to another, as the plaintiff's agent. *Floyd v. Day*, 3 *Mass. Rep.* 403.

It will lie on an express promise to pay the factor of any one for the use of the principal, where the suit is brought by the factor. *Van Staphorst v. Pearce*, 4 *Mass. Rep.* 259.

Where money was awarded by commissioners between *Great Britain* and the *United States*, to be paid over to those interested, and among others a sum was awarded nominally to one, the interest of which was in another, it will lie in favour of that other so entitled. *Heard v. Bradford*, *ibid.* 326.

out, and care should be taken that a proper agreement stamp is impressed upon it, otherwise it will not be admitted in evidence for the purpose of proving a contract, or the terms of it; and even if the party against whom it is offered in evidence, has wrongfully destroyed it before it has been stamped, no parol

Ch. II. s. 1.
Stamp duties.

So where a surety has paid the debt of the principal. *Bunce v. Bunce, Kirb. Rep.* 137.

For money paid by mistake in a settlement of accounts. *Sage v. Aleop, 1 Root's Rep.* 148.

So for the rents and profits of land. *Rogers v. Tracey, ibid.* 233. Et vide *Hal-dane et al. v. Duché's exrs.* 2 *Dall. Rep.* 176. *S. C.* 1 *Yeates' Rep.* 121.

An action of *special indebitatus assumpsit*, will lie for public securities, which are mortgaged. *Whiting v. Mc Donald, 1 Root's Rep.* 444.

So, for money received by the defendant, and by him misapplied. *Ormstead v. Doty, 2 Root's Rep.* 184. *Dumond's admr. v. Carpenter, 3 Johns. Rep.* 183. *McKee v. Myers, Addis. Rep.* 31.

So, for the consideration paid where the party has not received the thing con-tracted for, but a different one of no value. *Sanford v. Dodd, 2 Day's Rep.* 437.

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It will lie in favour of the trustees of a town to recover *damages*, for the non-de-livery of papers, records, &c. belonging to the corporation. *Trustees of Paris v. Trustees of Paris, Hardin's Rep.* 456.

If a father holds the legal title of land in trust for his son, and they agree to sell it, and the father receives the purchase money, and promises to pay the debts of the son, a creditor of the son, who had previously obtained judgment against him, and levied on the land, may sustain *assumpsit* for money had and received against the father. *Fleming v. Alter, 7 Serg. & R. Rep.* 293.

But it will not lie for the price of sand taken from a sand-bar to which both plain-tiff and defendant claim title, and sold by defendant. *Baker v. Howell, 6 Do.* 476.

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It lies for the non-performance of any promise or contract (not unlawful in it

Part II.
Statute of
Frauds.

(1) *Alexander v. Comber*, 1 H. Blac. 20.

(2) Vide cases cited in *Rondeau v. Wyatt*, and 1 Fombl. Treat. Eq. 168.

(3) *Rondeau v. Wyatt*, ubi supra. *Griffiths v. Young*, 12 East, 513.

(4) *Simon v. Motivos*, ubi supra.

(5) *Chaplin v. Rogers*, 1 East, 192.

(6) 1 East, 194.

(7) *Elmore v. Stone*, 1 Taunt. 453.

the operation of the Statute; and the case appears to have been principally decided on this ground.

In cases which are within the operation of the Statute, and where the terms of it are not complied with, the contract, while it remains unexecuted, is void altogether; (1) neither the buyer nor the seller can enforce the performance of it: and even if confessed in an answer to a bill in equity, still if the Statute be insisted upon, that Court, it should seem, from the majority of the cases, (2) will not decree a performance; and it is settled that no action at law can be maintained on such admission; (3) but where the agreement has been executed, the Statute does not apply; and therefore where a tenant agreed with his landlord, that if he would accept another person as tenant in his place, he would pay him 40*l.* out of 100*l.* which he was to receive from such person for the good-will, and in fact received the 100*l.* from him, he being cognizant of the agreement, the Court held that the 40*l.* might be recovered by the landlord as money had and received to his use.

The weighing of goods in the presence of the buyer's servant has been held a sufficient delivery within the 17th clause, (4) and where *A.* bought a stack of hay standing in *B.*'s yard, and afterwards sold a part of it to *C.* who took such part; this was held sufficient evidence of the delivery to *A.* to take the case out of the Statute. (5) So where goods are ponderous, and not easily moved, the delivery of the key of a warehouse where they are will be sufficient. (6) (h) And if a man, carrying on the distinct business of a livery stable keeper and dealer in horses, remove a horse which he has sold, to the stables kept for livery horses, on the purchaser desiring him to keep him at livery, this also has been deemed sufficient. (7) (i) Again, where the goods

(h) Vide *Wilkes et al. v. Ferris*, 5 Johns. Rep. 335.

Where on a sale of land, the vendee agrees to purchase certain ponderous articles on the premises, and then enters into possession of the land, the articles sold still remaining upon it; this is a sufficient delivery. *De Ridder v. M^r Knight*, 14 Do. 294.—*AM. ED.*

(i) Where on the sale of cattle no earnest money was paid, nor any memorandum in writing made, and the cattle were to remain in the possession of the vendor, at the risk of the vendee, until he called for them, and the vendee afterwards came and took them away, without saying any thing to the vendor; this was held a sufficient delivery within the Statute of Frauds. *Vincent v. Germond*, 11 Johns. Rep. 283.

The circumstances which are to be tantamount to an actual delivery, should be so strong and unequivocal, as to take away all doubt, as to the intent and understanding of the parties. *Bailey et al. v. Ogden et al.* 3 Johns. Rep. 394.—*AM. ED.*

are lying at a distant place in the custody of a third person, and the seller writes a note to such third desiring him to deliver them to the buyer, this also is sufficient evidence of a delivery to him to enable him to maintain an action against the seller, if he afterwards revoke that order.⁽¹⁾ It matters not how small the quantity delivered is, if it be considered by the parties as part of the thing sold. Thus, where sugars, while under lock in the King's warehouse, were advertised for sale, and after they were weighed, a sample of half a pound weight was taken from each hogshead, which sample was produced at the sale, and delivered to and accepted by the purchaser, as part of his purchase, to make up the quantity marked as weighed at the King's beam, this also was held to be a sufficient delivery.⁽²⁾ But to make a delivery of part of the goods within the Act, it must appear that what was delivered was considered by the parties to be part of the thing sold; and therefore a delivery of a sample of corn, when it appeared that such sample was not considered as part of the corn sold, was held not to take the case out of the Statute.⁽³⁾ In all the above cases the purchaser had done some act manifesting his intention of accepting the thing sold; but where a sale of tares, part of the vendor's stock remaining at home, took place at a public market, which it was agreed should remain in the vendor's possession till called for, and the agent of the vendor in his return home measured out the quantity agreed for and put them apart for the purchaser, this was holden to be no delivery.⁽⁴⁾

One other observation only remains to be made on this Statute, and that is, as to what shall be deemed a sufficient note or memorandum in writing: As to this it has been held, that sales of goods at an auction are not within the Statute, for that the entry of the buyer's name, &c. by the auctioneer,⁽⁵⁾ is a sufficient memorandum of the contract, and that he is the agent of both parties authorised to make it.⁽⁶⁾^(k)

Ch. II. s. 1.
Statute of
Frauds.

(1) Searle v.
Keeves, 2
Esp. N. P.
Cas. 598.

(2) Hinde v.
Whitehouse,
7 East, 558.

(3) Cooper
v. Elton,
7 T. Rep. 14.

(4) Howe
v. Palmer,
3 B. & A. 321.

(5) Vide 7
East, 568.

(6) Simon v.
Moxvies, ubi
supra.

Form of note or memorandum.

(k) It has been decided in *Connecticut*, that an advertisement that lands are to be sold at public auction, with the terms of the sale, &c. is a sufficient memorandum in writing within the Statute of Frauds to render the sale valid. *Hobby v. Finch et al. Krb. Rep. 14.*

So a letter under the hand of the party takes an agreement relating to lands out of the Statute. *Case v. Worthington, 1 Root's Rep. 172.*

Where one wrote his name and affixed his seal in blank to be filled up afterwards by another, it was held not to be a note in writing within the Statute of Frauds. *Jackson ex. d. Lloyd v. Tytus, 2 Johns. Rep. 430.*

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Frauds.

- (1) *Stansfield v. Johnson*, 1 Esp. Cas. 101.
- (2) *Walker v. Constable*, 1 Bos. & Pul. 306. *Buckmaster v. Harrop*, 2 Ves. 344.
- But in the case of a sale of *lands*(1) by auction, or otherwise, the contract is not binding, unless signed by the parties themselves, or their agents specially authorised for that purpose,(2) which, it has been said, a mere auctioneer employed by the seller could not be; but in a subsequent case, Lord ELDON expressed a doubt on this point;(3) and the Court of Common Pleas, after time taken to consider of the question, held, that a person by bidding aloud constituted the auctioneer his agent to write his name down as the purchaser, and thereby make a contract in his behalf: so that it is now settled that the agent need not be authorised in writing.(4)(l)

- (3) *Coles v. Trechick*, 9 Ves. jun. 349.

- (4) *Emmerson v. Heelis*, 2 Taunt. 38.

In an agreement for the sale of lands, it was held that the *consideration* for the promise as well as the *promise* itself, must be in writing. *Sears v. Brink*, 3 Johns. Rep. 210. *Violet v. Patton*, 5 Cranch's Rep. 142.

An entry made by the vendor of goods in his book of sales of the name of the purchaser and the terms of the contract of sale, which was read to the agent of the vendee, who made the purchase and assented to by him as correct, was held *not* to be a sufficient memorandum in writing within the Statute of Frauds, it not being signed by the party to be charged, or by his agent. *Bailey et al. v. Ogden et al. ibid.* 394.

Quere, Whether the vendor is bound by such a memorandum, so that the vendee could enforce the contract against him. *ibid.*

A letter promising to make a deed for a tract of land "according to contract," is a sufficient memorandum or note in writing, notwithstanding the terms of such contract be not mentioned; if the party claiming the conveyance can prove by the testimony of one witness what price was agreed to be paid for the land. *Johnson v. Ronald's adm.* 4 Munf. Rep. 77.

A memorandum, signed by the defendant only, whereby he agreed to deliver a quantity of cotton, takes the case out of the Statute of Frauds, though not signed by the purchaser. *Douglass & Co. v. Spears*, 2 Nott & Mc Cord's Rep. 207.

The memorandum must state the contract with reasonable certainty, although its form is not material, so that its substance can be made to appear and be understood from the writing itself, without recourse to parol proof. *Bailey et al. v. Ogden et al.* 3 Johns. Rep. 394. *Parkhurst et al. v. Van Cortland*, 1 Johns. Ch. Rep. 273. *S. C.* 14 Johns. Rep. 15. *Abeel et al. v. Radcliff*, 13 Do. 297.

Provided that the name be inserted in such a manner, as to have the effect to authenticate the instrument, the requisition of the act respecting the signature is complied with; and it does not matter in what part of the instrument the name is found, nor that the christian name is omitted. *Ogilvie v. Foljambe*, 3 Merivale's Rep. 53.

A memorandum in writing of the sale of lands, to be valid within the Statute, must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty, that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof. *Parkhurst et al. v. Van Cortland*, 1 Johns. Ch. Rep. 273.—*AN. EN.*

(l) Writing the purchaser's name as the highest bidder on the memorandum of sale, by the auctioneer, immediately on receiving the bid, and knocking down the hammer, is a sufficient signing of the contract within the Statute of Frauds, so as to bind the purchaser. *Mc Comb v. Wright*, 4 Johns. Ch. Rep. 659.

No particular form is required, it is sufficient that a note of the agreement is made in writing; and therefore if, on the treaty of marriage with the daughter of a man, he write a letter wherein he says he will give her such a sum of money as her portion;(1) or a mother who has agreed to give a sum of money as a portion with her daughter, sign, *as a witness*, articles made with her approbation for settling it;(2) either of these acts is sufficient to bind them: and if the seller of goods above the value of 10*l.* deliver to the buyer a printed bill of parcels, "Mr. *A.* bought of *B.* &c." this is a sufficient signature by him, though he does not write his name.(3)(*m*)

Ch. II. s. 1.
Statute of
Frauds.

(1) Bird v.
Blome,
2 Vent. 361.
Moore v.
Hart, 1 Vern.
110.

(2) Wellsford
v. Beezley,
1 Wils. 118.

(3) Sanderson
v. Jackson,
2 Bos. & Pul.
238.
Schneider
v. Norris,
2 M. & S.
286, S. P.

(4) Champion
v. Plummer,
1 Bos. & Pul.
N. Rep. 252.

(5) Boydell v.
Drummond,
11 East. 142.

But a memorandum made by the buyer's clerk in his book as follows, viz. "Bought of *W. P.* 20 puncheons of treacle, 37*s.* to be delivered by 10 *Dec.*" and signed by the seller, is not sufficient to bind him, because it does not appear by the memorandum to whom the treacle was sold;(4) and for a like reason where a printed prospectus was delivered out for a set of prints descriptive of scenes in the plays of Shakespear, and a book was opened intituled "Shakespear's subscribers, their signatures,"(5) in which the defendant signed his name, but which book did not refer to the prospectus, it was held the signature in the book was not sufficient to take the case of the Statute.(*n*)

So the circumstance of the defendant writing a letter to the plaintiff, stating that the article sent was not worth above so much, and therefore returning it to him,(6) does not amount ei-

(6) Kent v.
Huskinson, 3
Bos. & Pul.
233.

A sale of land by the Sheriff under an execution, is a sale within the Statute of Frauds, and requires a deed or note in writing to pass the estate. *Simonds v. Catlin*, 2 *Caines' Rep.* 60. *Jackson ex. d. Gratz v. Catlin*, 2 *Johns Rep.* 248.—AM. ED.

(*m*) Vide *Merritts et al. v. Clason*, 12 *Johns. Rep.* 192. *The exrs. of Clason v. Bailey et al.* 14 *Do.* 484.

A letter from a mother to her son, beginning, "*My dear Robert,*" and concluding "*Your affectionate mother,*" is not signed so as to constitute a binding agreement on the part of the mother, within the intent of the Statute of Frauds. It is not enough to identify; there must be signing, either by the signature of the name, or something intended by the writer as equivalent, such as a mark by a markman. *Selby v. Selby*, 3 *Merrivale's Rep.* 2.—AM. ED.

(*n*) An entry made by the vendor of goods, in his book of sales, of the name of the purchaser and the terms of the contract of sale, which was read by the agent of the vendee, who made the purchase, and assented to by him as correct, was held not to be a sufficient memorandum in writing, within the Statute of Frauds, it not being signed by the party to be charged or by his agent. *Bailey et al. v. Ogden*, 3 *Johns. Rep.* 394.—AM. ED.

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Statute of
Frauds.

Coopers.
Smith, 15
East, 103.

ther to a note in writing or an acceptance of the goods, so as to take the case out of the Statute.

Another case also lately occurred, where the plaintiff's rider, calling on the defendant, entered in his order book these words, viz "19 Feb. 1811. Of *John Smith*, 64*l*. (alluding to money then paid by the defendant;) Do. 40 of 3.58/" which was explained to mean that the defendant had ordered forty sacks of flour, called thirds, at 58*s*. a sack. This was not signed by the defendant, though read to him by the rider, and therefore the contract was held to be void.(o)

Bateman
v. Phillip,
15 East, 272.

But in a subsequent case, where an attorney wrote a letter to another attorney in these terms, viz, "The bearer *D. W.* has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid;" was held to be sufficient, though it was objected on the behalf of the defendant, that neither the sum nor the person to whom due was mentioned; and that if parol evidence were admitted, the plaintiff's attorney might apply this letter to a debt due to himself, or any other person, from *D. W.* and to any amount.

It was a few years since determined, that in cases falling within the 4th section of this Act, both the consideration and the promise must be set down in writing, and signed by the party to be charged therewith.(1) This doctrine was for some time much doubted by the profession, and the present Lord Chancellor expressed his dissent from it in two cases;(2) and in several other cases the Judges have studiously avoided giving an opinion upon it: but three cases(3) have lately occurred in the Courts of Exchequer, King's Bench, and Common Pleas, in which the Judges of those Courts unanimously confirmed it. But in the case mentioned in the 17th clause, it is sufficient if the note signed by the person to be charged with it state the promise, the consideration need not be mentioned.(4) And in the other case it is not necessary that there should be an undertaking on the part of the seller to deliver the goods; therefore a paper in these words, "I guarantee the payment of any goods which *A.* shall deliver to *B.*" is sufficient.(5)(p)

(1) *Wain v. Warlters*, 5 East, 10.

(2) *Ex parte Minet*, 14 Ves. 190.
Ex parte Gordam, 15 Ves. 286.

(3) *Lion v. Lamb, Jenkins v. Reynolds*, C. B. Trinity, 2 Geo. 4. Fell. Law. Merc. Guar. 36.

(4) *Egerton v. Matthews* 6 East, 307.

(5) *Stadt v. Lill*, 1 Camp. 242. 9 East, 348.

(o) The Statute of Frauds requires, in certain contracts, a memorandum to be signed by the parties to be charged; if there are acts to be done by both parties, and the one who is to perform a principal part signs, and it is accepted by the other party, there can exist no doubt, but that such a contract would be mutually obligatory. *Roget v. Merritt et al.* 2 Caines' Rep. 117. Vide *Ballard v. Walker*, 3 Johns. Cas. 60.—AM. ED.

(p) *Johnson v. Ronald*, 4 Munsf. Rep. 77.—AM. ED.

Evidence in actions on bill of exchange and promissory notes.

ANOTHER contract, which, by the custom of merchants, and the recognition of it by our Courts and the Legislature, must be in writing, is that by bills of exchange and promissory notes.(q)

(q) MARSHALL C. J. in the case of *Grant v. Naylor*, 4 *Cranch's Rep.* 236, remarks on this Statute, "already have so many cases been taken out of the Statute of Frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best Judges in *England* have been of opinion that this relaxing construction of the Statute ought not to be extended further than it has already been carried, and this Court entirely concurs in that opinion."

Promissory notes and bills of exchange.

The decisions upon the law in a commercial country, relative to bills of exchange and promissory notes, are of the highest importance, and although there is some discrepancy among them, yet the great and leading features of that law as settled in the country whence we derive our jurisprudence, has generally been adhered to, by the different tribunals in the *United States*.

In *Connecticut*, notes are treated as specialties, and not as negotiable instruments, and in other of the States, the effect of their negotiability is widely altered by legislative provisions.

Making the note, its form, &c.

The endorsee of a bill of exchange, drawn in a foreign country, and endorsed by one, who has his residence there, is answerable only according to the laws of that country. *Powers v. Lynch*, 3 *Mass. Rep.* 77.

A note made payable in foreign bills, is not a cash-note, and therefore not negotiable. *Jones v. Fales*, 4 *Mass. Rep.* 245. *Young v. Adams*, 6 *Do.* 182. *Storer v. White*, 7 *Do.* 448.

But a note payable in *York State Bills*, or specie, is. *Keith v. Jones*, 9 *Johns. Rep.* 120.

A. made a note payable to B. at a particular day; C. writes underneath, "I acknowledge myself holden as surety for the payment of the demand of the above note, witness my hand, C." It was held to be a joint and several promise. *Hunt v. Adams*, 5 *Mass. Rep.* 358.

In *Vermont*, a note deposited with arbitrators, subject to their endorsement to the amount of their award, is void. *Drake v. Collins*, 1 *Tyl. Rep.* 79.

A mistake in a bill of exchange, of the christian name of the drawer, is immaterial, if the bill be presented to the right person. *Sterry v. Robinson*, 1 *Day's Rep.* 11.

In cases of bills of exchange and notes, time is computed by calendar, and not by lunar months. *Leffingwell v. White*, 1 *Johns. Cas.* 99.

A promissory note, without words of negotiability, may, in an action by the payee against the maker, be declared on as a note, without the Statute. *Downing v. Backenstoes*, 3 *Caines' T. Rep.* 137.

A note made in *France*, but payable in *America*, is valid here, though not stamped according to the laws of *France*. *Ludlow et al. v. Van Rensselaer*, 1 *Johns. Rep.* 93.

A promissory note, in these words, "due to the bearer hereof, *sl.* 18s. 10d. which I promise to pay to A. or order, on demand," is not a note payable to bearer, but must be transferred by endorsement. *Cock v. Fellows*, 1 *Johns. Rep.* 143.

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On bills of
exchange, &c.

It is not the intention of this work to enter into the whole

Notes delivered after the time they bear date, are valid only from the day of delivery, and are to be considered as drawn on that day. *Lanning v. Gaine et al.* 2 *Johns. Rep.* 300.

A negotiable note expressed to be *for value received*, is a promise for a legal consideration, although as between the original parties, the promisor may shew that there was no value received. *Thacher et al. v. Dinwiddie*, 5 *Mass. Rep.* 299.

A note of hand is not, in *Massachusetts*, entitled to grace, unless it be made expressly payable with grace. *Putnam et al. v. Sullivan et al.* 5 *Do.* 55. *Jones v. Fales*, *ibid.* 254.

But when payable "*with grace*," these words must have the same construction as is given by the law merchant. *ibid.* *Widgery v. Mumree et al.* 6 *Do.* 449. *Furman v. Fowle*, 12 *Do.* 89.

A note or bill of exchange payable to order, is transferable by endorsement only. *Tyler v. Dinney*, 7 *Do.* 479.

Where a promissory note was payable to order, on a certain day, or when the promisee should complete a certain building; it was held that the note was payable on a day certain, and consequently that it was negotiable. *Stevens v. Blunt*, 7 *Mass. Rep.* 240.

In *Pennsylvania*, by Act of Assembly 27th February, 1797, (3 *Sm. L.* 278,) it is declared that promissory notes drawn in a certain form, shall be held free from defalcation.

But in the case of *Cromwell et al. v. Arrott*, 1 *Serg. & R. Rep.* 180, it was decided that this Act was intended only to place notes bearing date in the city or county of *Philadelphia*, on an equal footing with notes in other parts of the commercial world, but not to give the holder of a note the right to recover the whole that appears due on the face of it, under all circumstances.

All the sets of a bill of exchange, are considered as making but one bill. *Anth. N. P. Cas.* 44. *Durkin et al. v. Cranston et al.* 7 *Johns. Rep.* 442

A bill of exchange without the words "*or order*," or other words of negotiability, is not so endorsable as to enable the endorsee to bring an action in his own name. *Gerard v. Lacoste et al.* 1 *Dall. Rep.* 194. *Barriere v. Nairac*, 2 *Dall. Rep.* 249.

If the plaintiff purchase of the defendant a bill of exchange, which is afterwards lost, before it is presented, and the defendant refuses to give a second bill, the plaintiff may bring *indebitatus assumpsit*, for the purchase money. *Murray v. Carrot*, 3 *Call's Rep.* 378.

In *North Carolina*, promissory notes are not negotiable, unless they are for money. *Wofford v. M. Dowell*, *Rep. in. Co. of Conf.* 81. *Tindall's exrs. v. Johnston*, 1 *Hayw. Rep.* 372.

Also a bond, part in money, and part in specific articles, is not negotiable. *Jamieson v. Farr*, *ibid.* 182.

If two partners draw a note, payable to one of them, who endorses it to the plaintiff, the latter may recover on it. *Blake v. Wheadon*, 2 *Hayw. Rep.* 109. *Thompson v. Gaylard*, *ibid.* 150.

In *South Carolina*, an endorsement on the back of a bond, payable to order for value received, is a good bill, within the customs of merchants, so as to charge the endorser, though the bond be not negotiable in its nature. *Bay v. Freazer*, 1 *Bay's Rep.* 66.

Under the *English Statute*, no obligation to do a collateral thing is negotiable, though to order. *Breen v. Ingram*, *ibid.* 173.

Where a man draws a bill upon himself, it is like a note, and no damages are recoverable. *M. Candlish v. Cruger*, 2 *Bay's Rep.* 377.

law relating to these, or any other contracts. In its nature it is confined to the *proof* required in an action on them; but the

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Endorsement or transfer of notes, &c.

An endorsement made in the following words, "for value received, I order the contents of this note to be paid to A. B. at his own risk," transfers the property, with the negotiable quality attached to it, to the endorsee. *Rice v. Stearns et al.* 3 Mass. Rep. 225.

Where a note is not negotiated by the custom of merchants, the endorsee's interest must be made to appear, and the particular power of the endorsee be shown. *Woodbridge v. Austin*, 2 Tyl. Rep. 364.

An endorsee of a firm, of which he is a member, may, on an endorsement made by himself, in the style of the partnership, maintain an action against the maker of a promissory note. *Kerby v. Cogswell*, 1 Caines' Rep. 505.

Where the payer of a negotiable note, made a special endorsement, by which he was not to be made liable, and declaring that he did not know on what consideration the note was made, such endorsement could not of itself be evidence of the want of consideration of the note. *Russel v. Ball et al.* 2 Johns. Rep. 50.

A transfer or payment of a note, which is forged, is a nullity, and no payment. *Markle v. Hatfield*, 2 Johns. Rep. 455. *The People v. Howell*, 4 Johns. Rep. 296.

If the endorser of a promissory note proves that it was put into circulation by the drawer, by falsehood and fraud, he may call on the plaintiff to shew, how he came by it, and what he gave for it. *Holme v. Karsper*, 5 Binn. Rep. 469.

The directors of a banking company have power by their vote, or by a power of attorney, to authorise the president, or any officer of the bank, to assign over the promissory notes payable to the company. *The Northampton Bank v. Pepoon*, 11 Mass. Rep. 288.

The cashier of a banking company may, *ex officio*, endorse a promissory note, the property of the company, and authorise a demand on the maker, and notice to the endorsers. *Hartford Bank v. Barry*, 17 Do. 94.

The endorsement cannot in general be affected by any dealings between the original parties. *Prior v. Jacocks*, 1 Johns. Cas. 169.

But between the original parties, the consideration may be inquired into. *The People v. Howell*, 4 Johns. Rep. 296. *S. P. Pearson v. Pearson*, 7 Do. 26.

A note must be supposed to have been endorsed, on the day mentioned in the declaration, until the contrary be shewn. *Thorne v. Woodhull*, 1 Ansh. N. P. Cas. 74.

The payee of a note may restrain its negotiability, but if after a subsequent endorsement, makes it payable to order, he shall be liable to the subsequent holder. *Holmes v. Hooper*, 1 Bay's Rep. 160.

Payment of a note, &c.

In *Massachusetts*, a note is not entitled to grace, unless it be made payable with grace. *Jones v. Fales*, 4 Mass. Rep. 245.

Where the promisee of a note, payable at a certain day, contracts at the time, the note is given, not to demand payment of it, until a certain time after its maturity, such contract is a collateral promise, for the breach of which, if there be a legal consideration, an action may lie, but it will be no bar to an action on the note, when due, by the terms of it. *Dow v. Tuttle*, *ibid.* 414.

The fourth day of July, is a public holiday, and a note due on that day, is payable on the third day of the month. *Lewis v. Burr*, 2 Caines' Cas. in Er 195.

If a note fall due on Sunday, payment must be demanded on Saturday. *Jackson v. Richards*, 2 Caines' Rep. 343. *Johnson v. Height et al.* 13 Johns. Rep. 470.

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Legislature having imposed certain stamp duties upon them, the

Whether the protest for a bill of exchange must be made on the last day of grace. *Fenwick v. Sears*, 1 *Crauch's Rep.* 260.

A security negotiable in its creation, must, during its negotiation, preserve its negotiable quality; otherwise when it is assigned, the assignee would hold a contract by the assignment different from the contract assigned. *Rice v. Stearns et al.* 3 *Mass. Rep.* 225.

It is competent for joint payees of a promissory note, to assign the same to one of the payees, and such assignment will have the same effect, as if made to a stranger. *Russell's exr. v. Swan*, 16 *Mass. Rep.* 314.

If a bill of exchange or promissory note be payable so many months after date, calendar and not lunar months are intended. *Leffingwell v. White*, 1 *Johns. Cas.* 99.

Negotiability of notes, &c.

In an action by the endorser, against the drawer of a note, negotiated *subsequent to the day of payment*, the defendant may go into such evidence, as he would have been entitled to, had the action been brought by the original promisee. *Gold v. Eddy*, 1 *Mass. Rep.* 1.

A promissory note or bill of exchange, once paid, ceases to be negotiable. *Blake v. Sewell*, 3 *Mass. Rep.* 556. *Boyleston v. Green*, 3 *Do.* 465. *Baker v. Wheaton*, 5 *Do.* 509.

If an endorsee of a note, receive it under circumstances which might reasonably create suspicions that it was not good; as if he receive it after payment has been refused, or some time after it is made payable, or if the endorsee is not to be liable on his endorsement, the endorsee takes it liable to any legal defence, which might be made against a recovery by the endorser. *Ayer v. Hutchins et al.* 4 *Mass. Rep.* 370.

A note loses its negotiability after it becomes due, and every presumption is to be made against it. *Johnson v. Bloodgood*, 2 *N. York Cas. in Er.* 303. 1 *Johns. Cas.* 51. See vide as to its negotiability, *Cromwell et al. v. Arrott*, 1 *Serg. & R. Rep.* 180.

In an action brought by the endorsee of a note, against the drawer, payments to the payee cannot be set off, unless it have been unfairly obtained, dishonoured, or endorsed, when over due. *Prior v. Jacobs*, 1 *Johns. Cas.* 109. *Sebring et al. v. Rathbun*, *ibid.* 331. *Furman v. Huskin*, 2 *Caines' Rep.* 369. *Lansing v. Gaine et al.* 2 *Johns. Rep.* 300. *Thompson v. Robertson et al.* 4 *Johns. Rep.* 27. *O'Callaghan v. Sawyer*, 5 *Johns. Rep.* 118.

The same rule recognised in *Pennsylvania*. *Wilkinson et al. v. Nicklin et al.* 2 *Dall. Rep.* 396.

So on a sealed bill in *North Carolina*. *Black v. Bird*, 1 *Hayw. Rep.* 273.

So in *South Carolina* on a promissory note. *Bell v. Wood*, 1 *Bay's Rep.* 249.

In an action by a *bona fide* holder of a note, taken before due against the maker, the consideration cannot be inquired into. *Baker v. Arnold*, 3 *Caines' Rep.* 279. *Hendricks v. Judah*, 1 *Johns. Rep.* 318.

Where a note payable *on demand*, was negotiated five months after its date, and there were payments endorsed prior to its transfer, in an action upon this note by the endorsee, the maker was not allowed to set up any defence as against the payee, or to impeach the amount due on the face of the note, at the time of its transfer. *Sanford v. Mickles et al.* 4 *Johns. Rep.* 224.

In a subsequent case, where a note payable *on demand*, was negotiated two months and a half after its date, in a suit upon it by the holder, against the maker, he was allowed to shew payment to the original payee before the transfer of the note to the plaintiff. *Loose v. Dunkin*, 7 *Johns. Rep.* 70.

What is *reasonable time*, is a question of law; and a note, payable *on demand*, ne-

want of which renders them of no avail, it may be proper here

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negotiated eighteen months after its date, was considered as being out of time. *Furman v. Haskin*, 2 Caines' Rep. 369. Et vide *Conroy v. Warren*, 3 Johns. Cas. 259.

But in *Taylor v. Bryden*, 8 Johns. Rep. 173, it was held to be a question partly of fact, and partly of law. Et vide *Patton et al. v. Wilmot*, 1 Har. & Johns. Rep. 477.

So a note negotiated two years after date, was considered out of time. *Loomis v. Pulver*, 9 Johns. Rep. 244.

There is no precise time in which a note payable on demand is to be deemed dishonoured; but it must depend on the circumstances of the case, and the situation of the parties. *Lossee v. Dunkin*, 7 Johns. Rep. 70.

In an action by an endorsee against the drawer of a note, dated in *Philadelphia*, and payable *on demand*, without defalcation, where it appeared that the payee lived in *Philadelphia*, and the drawer at the distance of 180 miles; and that the first notice the drawer received of the endorsement was fourteen months after the date of the note, previous to which he had made payments to the payee, it was held that the jury might presume that the endorsee had notice of the payments. *Cromwell et al. v. Arrott*, 1 Serg. & R. Rep. 180.

The negotiability of a note negotiated in *New York*, is not subject to be destroyed by an attachment in *Pennsylvania*. *Ludlow v. Bingham*, 4 Dall. Rep. 47.

The assignee of negotiable paper is not liable to any equity between the original parties, of which he had no notice; but a commission of bankruptcy is notice to establish a right of set-off in the bankrupt. *Humphries v. Blight's ass.* *ibid.* 370.

The negotiability of a note may be restrained by endorsement, or special words in the body of the note. *Smith v. St. Lawrence*, 1 Hayw. Rep. 174.

A note not negotiable, is liable to all the equity existing between the original parties. *Welsh v. Watkins*, *ibid.* 349. *Martin v. Spier*, *ibid.*

Where a note has been negotiated after it becomes due, the endorsee takes it, subject to every defence that existed in favour of the maker of the note, before it was endorsed. *Johnson v. Bloodgood*, 1 Johns. Cas. 51, S. C. 2 Caines' Cas. in Er. 302. S. P. *Sebring v. Rathbun*, 1 Johns. Cas. 331. *Jones v. Carwell*, 3 Johns. Cas. 29. *Hendricks v. Judah*, 1 Johns. Rep. 319. O' *Callaghan v. Sawyer*, 5 Do. 118. *Lansing v. Gains et al.* 2 Johns. Rep. 300. *Same v. Lansing*, 3 Do. 354.

Protest of a bill of exchange, &c. and non-payment of notes, and notice thereof.

An endorser of a bill of exchange, is entitled to notice of the bill's being dishonoured, notwithstanding the insolvency and absconding of the drawer. *May v. Coffin*, 4 Mass. Rep. 341. *Barton v. Baker*, 1 Serg. & R. Rep. 334.

A citizen of the *United States* being in the *East Indies*, endorses to merchants living in *Madras*, a bill of exchange, payable in *London*, and returns to the *United States*. The endorsees forward it to their agent in *London*, by whom it is presented and protested for non-acceptance and non-payment; and thereupon he returns it to his principals, the endorsees in *Madras*, who, within a reasonable time afterwards, send notice thereof to the endorser then in the *United States*; it was held to be a sufficient notice to charge the endorser. *Colt v. Noble*, 5 Mass. Rep. 167.

When the maker of a note has assigned all his property to the endorser, for his security against his endorsements, the endorser is considered, by accepting the assignment, as waiving a demand on the maker, as well as notice to himself, by an endorsee. *Bond et al. v. Farnham*, *ibid.* 170.

An endorser of a note must use due diligence to recover the money, and give notice of the non-payment in a reasonable time, otherwise he cannot recover against the endorser. *Phelps v. Blood*, 2 Root's Rep. 518.

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Where the endorser of a note, before it became due, informed the holder, that the maker had absconded, and that being secured for his responsibility, he would give a new note, and requested time to pay, and in the mean time the note fell due, it was held that the holder was not bound to make a demand on the maker, or give notice to the endorser. *Leffingwell v. White*, 1 Johns. Cas. 99.

Where the holder of a note on the day it was payable, received a part from the maker, and gave notice of non-payment generally to the endorser, it was held sufficient to charge the endorser with the residue. *James v. Badger et al.* *ibid* 131.

A notice to the endorser on the third or last day of grace, after a demand on the maker and his default, is good. *Corp v. M'Comb*, *ibid* 323.

The prevalence of a malignant fever in *New York*, was held a sufficient excuse, for not giving notice until *November*, of the protest of a bill of exchange for non-payment made in *September*. *Turno et al. v. Lague*, 2 Johns. Cas. 1.

The drawer of a bill of exchange, which has been accepted, is not responsible until after the default of the acceptor, and the holder must use due diligence to demand payment of the acceptor before he can resort to the drawer. *Munroe et al. v. Easton*, *ibid* 75. *Fisher v. Evans*, 5 Binn. Rep. 541. *Freeman v. Boynton*, 7 Mass. Rep. 483.

There is no particular form of notice of payment to an endorser of a note: it is sufficient if under all the circumstances it put him on the inquiry. *Reedy v. Saxxas*, 2 Johns. Cas. 337. Vide *Smith v. Whiting*, 12 Mass. Rep. 6.

Want of funds belonging to the drawer excuses notice of non-payment, as well when the bill of exchange is accepted as when it is not. *Hoffman v. Smith*, 1 Caines' Rep. 157.

If the maker of a note cannot be found when it becomes due, evidence of it, is sufficient to support the general averment that the notes was presented and payment refused. *Stewart v. Eden*, 2 Caines' Rep. 121.

But if the maker of a note has absconded, and is not to be found, when the note falls due, a demand of payment is not necessary in order to charge the endorser. *Duncan v. M' Cullough*, 4 Serg. & R. Rep. 480.

If the endorser of a note be dead at the time it becomes payable, and there are executors or administrators known to the holder, notice of the non-payment must be given to them, for they represent the testator or intestate. *Merchant's Bank v. Birch's exr.* 17 Johns. Rep. 35.

A check is a bill of exchange, and must be in like manner presented for payment in reasonable time. Want of funds in the hands of the drawer, will not excuse the want of presentment; otherwise when the drawer or maker of a check has withdrawn his funds. *Devoe et al. v. Moffat*, *Anth. N. P.* 161.

So where the endorser of a note has two houses, one in *New York* and one in *York Island*, notice of non-payment left in *New York* is sufficient. *ibid*.

Notice to the endorser of a note, if previous to a demand on the maker, is bad, though it be on the first day after the expiration of the days of grace. *Jackson v. Richards*, 2 Caines' Rep. 343. Vide *Whitwell et al. v. Johnson*, 17 Mass. Rep. 449. *May v. Coffin*, 4 Mass. Rep. 341. *Crossen v. Hutchinson*, 9 Do. 205. *Hussey v. Freeman*, 10 Do. 184. *Sandford v. Dillaway*, 10 Do. 52. *Farinum v. Frole*, 12 Do. 89. *Bank of America v. Vardon*, 2 Dall. Rep. 78. *Mallory v. Kirwan*, *ibid* 192. *Warder v. Carson's exrs.* *ibid* 233. *Bank of America v. Pettit*, 4 Do. 127. *Ball v. Dennis*, *ibid* 168. Sed contra. *Agan v. M'Manus*, 11 Johns. Rep. 181. *Stothart v. Parker*, *Overt. Rep.* 261.

When upon a bill payable so many days *after sight*, the holder presents the bill for acceptance, and elects to consider what passes on such presentment as a non-acceptance, (though in strictness he might have acted otherwise,) and protests the

see that a proper stamp is impressed ; one of the same, or greater

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bill for non-acceptance, he is bound by such election, as to all the other parties to the bill, and must give due notice to them of the dishonour accordingly, otherwise they will be discharged. *Mitchell v. Degrand*, 1 *Mason's Rep.* 176.

When the facts are ascertained, whether the notice be reasonable or not, is purely a question of law. *Taylor v. Bryden*, 8 *Johns. Rep.* 133. *Bryden v. Bryden*, 11 *Do.* 187. *Ireland et al. v. Kip*, *ibid.* 231. *Hussey v. Freeman*, 10 *Mass. Rep.* 84. *Et vide Ferris v. Saxton*, 1 *South. Rep.* 1.

Where the parties live in the same town, personal notice must be given of the non-payment—but, in other cases, the putting of a letter into the mail, addressed to the party entitled to notice is legal notice. *Shepard v. Hall*, 1 *Con. Rep.* 329.

A note payable at a particular place, must be presented there for payment, though the parties reside elsewhere. *The Hartford Bank v. Stedman et al.* 3 *Do.* 489.

A bill was drawn and dated in *Alexandria*, on persons residing in *New York*, who accepted it. The drawer's residence was, in fact, in *Fairfield*, in *Connecticut*; which was publicly known, and was particularly known to one of the acceptors. The bill being protested for non-payment immediately afterwards, two letters containing notice, were put into the post-office at *New York*, one addressed to the drawer at *Alexandria*, and the other to him at *New York*, and a third addressed to him at *New York*, was left at the counting house of the acceptors. It was held that although the holder was ignorant of the drawer's place of residence, yet as it did not appear that he had used due diligence to make inquiry, the notice given was insufficient. *Barnwell et al. v. Mitchell*, 3 *Do.* 101.

An endorser of a note of an insolvent, is not liable without any previous demand on the maker, and notice, though the endorsement have been without any consideration, and merely to give currency to the paper. *Jackson v. Richards*, 2 *Caines' Rep.* 243. *Buck v. Cotton*, 2 *Con. Rep.* 126.

A bill of exchange was drawn and dated at *New York*, on persons residing there who accepted it; the drawers in fact resided in *Petersburg*, (*Virginia*;) the bill was protested for non-payment; on the same or next day, two letters were put into the post-office giving notice to the drawers, the one directed to *New York*, the other to *Norfolk*, the supposed residence of the drawers; it was held that as it did not appear the holder knew of the drawer's place of residence, that he used due diligence. *Chapman v. Lipcombe et al.* 1 *Johns. Rep.* 293.

A notary on protesting a note is not bound to give all the endorser's notice. *Morgan v. Van Ingen*, 2 *Johns. Rep.* 204.

Where an endorser of a note which has not been paid by the maker afterwards promises the holder to pay the note, a previous demand on the drawer and notice to the endorser need not be proved, but will be presumed. *Pierson et al. v. Hooker*, 3 *Johns. Rep.* 68. *Hopkins v. Lirwell*, 12 *Mass. Rep.* 52.

A protest of a bill of exchange for non-acceptance is sufficient to maintain a suit by the holder against the drawer without a protest for non-payment: and if the declaration state such a protest, it may be rejected as surplusage. *Mason v. Franklin*, 3 *Johns. Rep.* 302. *Welden et al. v. Buck et al.* 4 *Johns. Rep.* 144.

Where a bill was drawn on a person at *Liverpool* payable in *London*, and the bill was duly presented at *Liverpool*, and protested for non-acceptance, and afterwards for non-payment at *Liverpool*, it was held sufficient, as no place in *London* was designated, and the holder might at his election cause the bill to be protested for non-payment in *London*, or at the place where the drawee lived. *Mason v. Franklin*, 3 *Johns. Rep.* 102.

So where another bill being drawn on a person in *Liverpool*, payable in *London*, and after being protested for non-acceptance at *Liverpool*, was protested at *London*, for non-payment, it was held as no place of payment in *London* was specified in the

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value, but of another denomination, will not be sufficient; (1) but

bill, the holder was not bound to make any inquiry after the drawee there. *Boat et al. v. Franklin*, 3 Johns. Rep. 207.

(1) *Farr v. Price*, 1 East, 55.* Where a creditor recovered from his debtor an order on a third person for the amount of his debt, which the drawee agreed to pay in ten or fifteen days, and the order was not presented until three months after, and in the mean time the drawee failed, it was held that the holder had not used due diligence, and that the drawer was discharged. *Brower v. Jones*, *ibid.* 230.

An acceptor of a bill cannot object that a demand was not made on him personally; it is sufficient if it be stated that payment was demanded at the house or place where the bill was accepted to be paid. *Foden et al. v. Sharp et al.* 4 Johns. Rep. 183.

If an endorser of a note who has not had regular notice of the non-payment of the maker, with a full knowledge of the fact, makes a subsequent promise to pay, it is a waiver of the want of due notice. *Duryee v. Dennison*, 5 Johns. Rep. 248. *Miller v. Hackley*, *ibid.* 375.

Where a bill has been protested for non-acceptance, and due notice given to the endorser, it is no objection that the demand of payment or protest were a day too late, as the liability of the party for the non-acceptance is already fixed. *ibid.*

The protest of a promissory note is no evidence by itself; the demand and notice must be proved as if no protest had been made. *Cummings v. Fisher*, 1 Auth. N. P. Cas. 1.

Where the maker of a note is notoriously absent in a foreign country, diligent inquiry for him need not be proved. *ibid.*

Notice of protest of a bill of exchange must be given notwithstanding the prevalence of an epidemic. *Roosevelt v. Woodhull*, *ibid.* 21.

Where a bill is remitted to pay a precedent debt, if due diligence be not used in obtaining payment and due notice of dishonour given, it will be a satisfaction of such debt. *Cooper v. Powell*, *ibid.* 31.

A protest for non-payment must appear under a notarial seal, but it is not necessary that the non-acceptance should be certified in the protest; for that may be sufficiently established by other evidence. *Morris v. Foreman*, 1 Dall. Rep. 193.

If the holder do not give reasonable notice of the protest, he takes the loss upon himself. *Steinmetz et al. v. Currey*, 1 Dall. Rep. 234, 270. *Robertson et al. v. Vagle*, *ibid.* 252. *Bank of North America v. Vardon*, 2 Dall. Rep. 78. *Watts v. Wil-*

* Several cases have lately occurred on this subject, some at *Nisi Prius*, where a question depending on several Acts of Parliament could not be very accurately considered; and others in Bank, where the different Statutes have been referred to and discussed. I shall only refer to those of the latter description. In the case of *Farr v. Price*, 1 East, 55, cited above, the Court held that a promissory note for 25*l.* 5*s.* written upon a 9*d.* stamp, (being the stamp imposed by 31 Geo. 3, c. 25, on notes not exceeding 50*l.*) instead of an 8*d.* stamp, (being that required by Stat. 37 Geo. 3, c. 90, on notes not exceeding 30*l.*) was void. But in *Taylor v. Hague*, 2 East, 414, it was determined that a promissory note for 45*l.* which by law required a stamp of 1*s.* 6*d.* composed of three different sums applicable to three different funds, under three Acts of Parliament, being written on a 2*s.* stamp, composed of three different sums applicable to the same funds, though in larger proportions to each than was required, such note was good. In the last case, the note was drawn since the 37 Geo. 3, but it has been very lately determined that a note drawn before that Statute upon a receipt stamp of equal value, is not good. *Chamberlain v. Porter*, 1 Bos. & Pul. N. R. 30.

Note. By Statute 44 Geo. 3, c. 98, all former stamp duties are repealed after 10th Oct. 1804, and new ones imposed, as was again done by 55 Geo. 3, c. 124.

the Legislature(1) has provided that, in such case, the commis- Ch. II. s. 1.
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ling, *ibid.* 101. 130. *Bank of North America v. M Knight, ibid.* 158. *Mullory v. Kirwan, ibid.* 192. *Warder v. Carson's exrs. ibid.* 233. *S. C. 1 Yeates' Rep.* 531. (1) By Stat. *Donaldson v. Means, 4 Dall. Rep.* 109. *Bank of North America v. Pettis, ibid.* 37 Geo. 3, c. 127. *Bank of North America v. Wycoff, ibid.* 151. *Bull v. Dennison, ibid.* 163. 136, a. 4 & 5. *Henry v. Dornaghy, Addis. Rep.* 40. *Craig v. Brown, 1 Peters' Rep.* 171.

See the above cases as to what is reasonable notice?

On this point in *Virginia*, see *Stott et al. v. Alexander, 1 Wash. Rep.* 423. *Wood v. Luttrell, 1 Call's Rep.* 233. Et vide *Wilson v. Lenox, 1 Cranch's Rep.* 195. *Fenwick v. Sears, ibid.* 260. *French v. Bank of Columbia, 4 Cranch's Rep.* 141. So in *North Carolina*. *Greenlee v. Young, 1 Hayw. Rep.* 3. *Brown v. Craig, ibid.* 378. *Pon's exrs. v. Kelly, 2 Hayw. Rep.* 45. *London v. Howard, ibid.* 303. 332.

In *South Carolina*. *Scarborough et al. v. Harris, 1 Bay's Rep.* 177. *Edwards v. Thayer, 2 Do.* 217. *Payne v. Winn, ibid.* 374.

In *New Orleans*. *Duncan v. Young, Martin's New Ori. T. Rep.* 32.

Where the drawee of a bill of exchange has no funds in the hands of the drawer, there is no necessity for notice of non-acceptance to the drawer. — *v. Stanton, 1 Hayw. Rep.* 271.

It is not necessary that actual notice should be given in every case; but it will be considered as *constructive* notice, if it be left at the house of the endorser, or sent by mail, even though the letter should miscarry. *Smith v. Bank of Washington, 5 Serg. & R. Rep.* 318.

Putting a letter in the post office will be considered as notice, whether it be received or not, provided it might have reached the person to be affected in the regular course of the mail, but it will be notice only from the time at which it ought to have been received. *ibid. The Lincoln & Kennebeck Bank v. Page, 9 Mass. Rep.* 155. *Fame v. Hammett, ibid.* 159. *Bussard v. Levering, 6 Do.* 102. *Landenberger v. Beall, ibid.* 104.

Notice left with the family of a seafaring man, during his absence at sea, is sufficient. *Fisher v. Evans, 5 Binn. Rep.* 542.

Liability of the parties on a note, &c.

An endorsee for a valuable consideration of a note *not* negotiable, may write over the name of the endorser a promise to pay the contents of the note to the endorsee, who may maintain an action against the endorser upon such endorsement. *Josselyn v. Ames, 3 Mass. Rep.* 274.

The endorser of a note is liable to pay it, on the implied condition that the endorsee shall present it to the promisor when due, and demand payment of it, if it can be done by using due diligence, and also giving seasonable notice to the endorser of the failure of the promisor; and if the endorsee do not comply with this condition, the endorser is discharged, unless he has waived the condition. *Putnam et al. v. Sullivan et al. 4 Mass. Rep.* 45. *Jones v. Fales, ibid.* 245. *Bond et al. v. Farnham, 5 Do.* 170. *Freeman et al. v. Boynton, 7 Do.* 483. *Shaw v. Griffith, ibid.* 494. *Henry v. Jones, 8 Do.* 453. *Copp v. M Dugall, 9 Do.* 1. *The Lincoln & Kennebeck Bank v. Page, ibid.* 155. *Crosen v. Hutchinson, ibid.* 205. *Tower v. Durell, ibid.* 332. *Sandford v. Dillaway, 10 Do.* 52. *Hussey v. Freeman, ibid.* 84. *Farnum v. Fowle, 12 Do.* 89. *Thayer v. Brackett, 12 Do.* 450.

A promissory note given by one member of a commercial company to another member, for the use of the company, will sustain an action at law by the promisee in his own name, notwithstanding both are partners in the company, and the money

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signers of stamps may order a proper stamp to be impressed on

when recovered, will belong to the company. *Van Ness v. Forrest*, 8 *Cranch's Rep.* 30.

When a promissory note is endorsed and delivered to a *bank* for collection, there is an implied undertaking on the part of the *bank*, in case the note is not paid, to give notice of the maker's default to all the endorsers; and if they neglect to give such notice, the holder may maintain assumpsit against them for their *nonfeasance*; the deposit of the note and the probable profit to arise from the money remaining back, being a beneficial act, and affording a good consideration to support a promise. *Smedes v. Bank of Utica*, 20 *Johns. Rep.* 372.

But if given to a notary, it seems the *bank* is not liable for his neglect, *ibid.*

If payment of a note entitled to days of grace be demanded of the maker before the last day of grace, the endorser is not liable. *Jones v. Fales*, 4 *Mass. Rep.* 245.

Where one gave a negotiable note, as guardian of an insane person, it was held that he was liable in his individual capacity after his guardianship was discharged. *Thatcher v. Dinmore*, 5 *Mass. Rep.* 299. Vide *Ballou v. Talbot*, 16 *Mass. Rep.* 461.

In an action by the endorsee against the drawer of a note, if the defendant set up payment to the promisee as a defence, such payment must have been *before* the endorsement, or the defence will not be substantial. *Webster v. Lee*, *ibid.* 334.

A bill of exchange was endorsed thus: "*Pay T. W. or order, for our use, value received in account.*" The payee had given an obligation to the drawer to pay the amount of the bill when that should appear to have been paid, and if it should be dishonoured it was to be exchanged for the obligation, the drawer to pay all expenses. In an action upon the bill by the endorsee against the drawer, it was held that this evidence was properly given to the jury, and that the defendant was not liable. *Wilson v. Holmes*, *ibid.* 543.

In *Connecticut*, where an assignment of a note contains a promise it shall be paid when it becomes due, an action lies against the assignor when the note becomes due, if it be not paid. *Perkins v. Perkins*, 1 *Root's Rep.* 541.

A blank endorsement on a note will render the endorser liable in case it cannot be recovered by the endorsee's using due diligence. *Bradley v. Phelps*, 2 *Root's Rep.* 285.

If a bill of exchange be not accepted, an action will lie upon it against the drawer before the time when it is payable. *Sterry v. Robinson*, 1 *Day's Rep.* 11. *Watson v. Loring*, 3 *Mass. Rep.* 557. *Weldon v. Black*, 4 *Johns. Rep.* 144. *Winthrop v. Pepon* et al. 1 *Bay's Rep.* 468.

If an endorser of a note pay it after the maker has been discharged under the insolvent Acts he may recover the amount from the maker, whose discharge will be no bar to the action. *Frost v. Carter*, 1 *Johns. Cas.* 73.

Where one of a set of three bills of exchange on *London* was protested for non-payment, it was held that an action might be maintained here against the endorser on one of the set not protested with the protest of the other; that a proceeding against the acceptor under a commission of bankruptcy in *London*, did not discharge the right of action against the endorser. *Kerworthy v. Hopkins*, *ibid.* 107.

The drawer of a bill of exchange accepted, is not liable until due diligence has been used to recover it of the drawee. *Mumroe et al. v. Easton*, 2 *Johns. Cas.* 75.

The holder of a bill, though he receive only as a matter of courtesy as agent, cannot retain a note without using diligence, and if he do he will be liable. *Rutgers et al. v. Lucet*, *ibid.* 92.

If the payee of a note payable to him or bearer, put his name on the back, he may be sued as endorser in the same manner as if it were payable to his order. *Brush v. Reeves' admr.* 3 *Johns. Rep.* 439.

payment of the duty, and 40s. in case the bill, &c. shall be pro- Ch. II. s. 1.
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In *Virginia*, the assignee of a note must sue the maker before he can resort to the assignor. *Lee v. Love*, 1 *Call's Rep.* 497. Et vide *Clark v. Yeung*, 1 *Cranch's Rep.* 181.

A general acceptance of an order binds the acceptor to the payee who took the order for a valuable consideration, notwithstanding the inducement of the acceptor afterwards failed, without any fault of the payee. *Corbin's admr. v. Southgate*, 3 *Hen. & Munf. Rep.* 319.

Whether the endorser of a bill of exchange is discharged by the holder of the bill charging the drawer in account current, where, upon the whole account current, the balance due is less than the amount of the bill. *Wilson v. Lenox*, 1 *Cranch's Rep.* 195.

Whether the endorser is discharged by the holder's receipt of part of the money from the drawer *ibid.*

Wherever a new credit or time for payment is given by the holder of a bill of exchange to the drawer, the endorser is discharged. *Scarborough et al. v. Harris*, 1 *Bay's Rep.* 177. *Shaw v. Griffith*, 7 *Muss. Rep.* 494.

In an action on a bill accepted by defendant, he cannot shew the want of funds in his hands. *Scarborough v. Geijer*, 1 *Bay's Rep.* 368.

The endorsement of a note in part, and afterwards the residue, will not bind the endorser. *Hughes v. Kiddell*, 2 *Bay's Rep.* 324.

Where a check dated 12th April, 1796, which was never presented to the bank for payment, but a suit was brought about four years after against the drawer, it was held that the plaintiff was not entitled to recover. *Cruger v. Armstrong et al.* 3 *Johns. Cas.* 5.

A check must be presented at the bank within a reasonable time. *Cornoy v. Warren*, 3 *Do.* 259. *Cruger v. Armstrong et al. ibid.* 5.

But where the drawer sustains no injury by its not being presented, as, where he defeats the payment of the check, by withdrawing his funds at the bank, he cannot object to the delay in presenting it. *ibid.*

Want of demand on the maker or acceptor, will be excused when he cannot be found, and may be given in evidence under an averment, that the note was presented and payment refused. *Stewart v. Eden*, 2 *Caines' Rep.* 121. Vide *Foden et al. v. Sharp*, 4 *Johns. Rep.* 183.

That the drawer has no funds in the hands of the drawee, is no excuse for not demanding payment. *Cruger v. Armstrong et al.* 3 *Johns. Cas.* 5.

Consideration of a bill, &c.

Every note within the Statute, imports a consideration, unless the contrary appear in the note itself. *Goshen Turnp. Co. v. Hurtin*, 9 *Johns. Rep.* 217. *Mandeville v. Welch*, 5 *Wheat. Rep.* 377.

The words "value received," in a note, are *prima facie* evidence of a consideration, and sufficient to cast on the defendant the burthen of proving the contrary. *Jerome v. Whitney*, 7 *Johns. Rep.* 321. Contra, *Lansing v. Mc Killip*, 3 *Caines' Rep.* 236.

The holder of a bill, note, or check, is *prima facie* to be deemed the rightful owner of it, and he need not prove a consideration, except when circumstances of suspicion appear. *Cruger v. Armstrong et al.* 3 *Johns. Cas.* 5. *Cornoy v. Warren, ibid.* 259. *Riddle v. Mandeville et al.* 5 *Cranch's Rep.* 322.

Notes delivered after the time they bear date, are valid only from the day of delivery, and are to be considered as drawn on that day. *Lansing v. Gains et al.* 2 *Johns. Rep.* 300.

Where a promissory note was given for the purchase of real property, and the

Part II. duced to them before due; but if not produced till afterwards,
On bills of then it may be stamped, on payment of the duty and 10l.
exchange, &c.

title to it fails, it is no good defence against the note, unless the failure be total. *Greenleaf v. Cook, 2 Wheat. Rep. 13.*

Acceptance and non-acceptance.

An acceptance by a collateral paper, is good. *McEvers v. Mason et al. 10 Johns. Rep. 207.*

It seems, that a promise to accept a bill already drawn, may, under circumstances, amount to an acceptance. *Mayhew et al. v. Prince, 11 Mass. Rep. 54.*

But *it seems*, that a promise to accept a bill not *in esse*, will not amount to a legal acceptance. *ibid.*

A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, if shewn to the person, who afterwards takes the bill on the credit of the letter, is a virtual acceptance, binding upon the promisor. *Cordidge v. Payson, 2 Wheat. Rep. 66.*

Remedy on notes, &c.

In an action by an endorsee against an endorser of a note, the plaintiff is not held to prove a demand on the promiser, if it appear that he had absconded before the note was payable. *Putnam et al. v. Sullivan et al. 4 Mass. Rep. 45. Widgery v. Munroe et al. 6 Do. 440. Hale v. Burr, 12 Do. 86.*

In an action against the maker of a note by the drawee, the defendant may give in evidence under *non-assumpsit* the want of consideration. *Hawley v. Beeman, 2 Tyler's Rep. 238. ibid. 230. Tappen v. Van Wagenen, 3 Johns. Rep. 458.*

A note given for a consideration that is against law may be avoided in an action brought upon it. *Kitchum v. Scribner, 1 Root's Rep. 95.*

A note for specific articles payable on demand, must be specially demanded. *Dean v. Woodbridge, ibid. 191.*

A bill of exchange remitted to pay an antecedent debt returned protested, will not be entitled to damages. *Kenworthy v. Hopkins, 1 Johns. Cas. 107. Thompson v. Robertson et al. 4 Johns. Rep. 27.*

Same point in *Pennsylvania. Chapman v. Steinmetz, 1 Dall. Rep. 261.*

A note given for a valuable consideration, may be given in evidence under the money counts in an action of *assumpsit*. *Smith v. Smith, 2 Johns. Rep. 235.*

A note to pay a certain sum of money in lands, may be given in evidence under the money counts: and the admission of the defendant that he could not convey the land, and his promise to pay the note, are sufficient evidence of a consideration. *Smith v. Smith, ibid.*

A bill of exchange may be given in evidence in an action by the payee against the maker, under the money counts. *Cruger v. Armstrong et al. 2 Johns. Cas. 5 S. P. Arnold v. Crane, 8 Johns. Rep. 62.*

A promise by an endorser to pay a note, after being discharged, by neglect of due notice, is not binding, unless made with a knowledge of all the material facts. *Martin v. Winslow, 2 Mason's. Rep. 241.*

The right to recover 20 per cent. damages on the protest of a foreign bill of exchange rests with us on *immemorial commercial usage*, sanctioned by a long course of judicial decisions. In *Great Britain*, it does not exist. Per SPENCER J. *Hendricks v. Franklin, 4 Johns. Rep. 119.*

On a bill of exchange drawn in a foreign country, and made payable there, when sued on here, the plaintiff can recover interest only according to the legal rate of the country where the contract was made. *Foden et al. v. Sharp, 4 Johns. Rep. 183.*

In cases, however, where a bill or note is not properly stamped. Ch. II. s. 1.
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exchange, &c.

In *Pennsylvania*, the damages are regulated by Statute passed 30th March, 1821. 7 *Laws Penn.* 434.

Where the endorser of a promissory note has incurred expenses in a suit against the maker, in which he has failed, the endorser is not liable on his endorsement for those expenses, or for any damages beyond the amount of the principal and interest of the note. *Capp v. M^r Dougall*, 9 *Mass. Rep.* 1.

In an action on the case by the payee and endorser of an accepted bill, (who had paid the bill with damages and costs,) against the acceptor, to recover the amount, in which the *narr.* does not state the recovery against the plaintiff, and there is no money count, the plaintiff cannot recover the damages and costs paid by him. *King et al. v. Phillips*, 1 *Peter's Rep.* 350.

In an action on a note, wherein the defendant promised to pay the plaintiff twelve months after date \$250, in brown cotton shirting, at the price of 30 cents per yard, and on his default, offered evidence to shew that cloth of that description, at the time the note became payable was of less value than 30 cents per yard, held that such evidence was inadmissible, the sum specified in the note being the rule of damages. *Brooke v. Hubbard*, 3 *Con. Rep.* 58.

The holder of a negotiable note, endorsed in blank, if he came into the possession of the note fairly, and without fraud, may maintain an action thereon in his own name, as endorsee, although he be not the owner of the note, but an agent or trustee merely. *Little v. Obrien*, 9 *Mass. Rep.* 423.

An action on a note, payable by instalments, may be maintained to recover such instalments as have become due, although all of them are not due. *Tucker v. Randall*, 2 *Mass. Rep.* 283. *Estabrook v. Moulton*, 9 *Do.* 252.

An innocent and *bona fide* endorsee of a note, which is void in its creation, may maintain an action against the endorser on his endorsement, to recover the amount of the note. *Capp v. M^r Dougall*, 9 *Do.* 1.

In an action against the endorser of a note not negotiable, the endorsee may declare as in the case of a negotiable note. *Sanger v. Stimpson*, 8 *Do.* 260. *Jones v. Fales*, 4 *Do.* 245.

The holder of a bill drawn in the *United States* on *Great Britain*, can recover no more than the contents of the bill and the damages with interest at the par of exchange; he can recover nothing for the difference between the price of the bills at the time the bill was returned and the time it was drawn. *Hendricks v. Franklin*, 4 *Johns. Rep.* 119.

Upon a bill of exchange drawn in *England*, and payable there, the holder can only recover the interest allowed by that country. *Foden et al. v. Sharp*, *ibid.* 183.

A note made in *Jamaica*, payable in *New York*, is governed by the laws of *New York*. *Thompson v. Ketcham*, *ibid.* 285. *Warren v. Lynch*, 5 *Johns. Rep.* 239.

In *North Carolina*, it has been ruled that the damages for non-payment of a bill of exchange shall be according to the law of the place where the bill is drawn. *Anonymous*, 2 *Hayw. Rep.* 280.

A note made in another State, must be assigned by the laws of that State. *Rutledge v. Reed*, *ibid.* 243.

It has been ruled in *South Carolina*, that a contract being made to be performed in a foreign country, the *lex loci* must govern it. But where it is made in a foreign country to be performed in *Carolina*, the laws of *Carolina* must be the true rule. *McCandlish v. Cruger*, 2 *Bay's Rep.* 377.

A plaintiff in an action on a bill of exchange, may strike out a special, as well as a general endorsement. *Morris v. Foreman*, 1 *Dall. Rep.* 193.

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Alves v.
Holgaon, 7 T.
Rep. 241.
Tyle v. Jones,
cited 1 East,
58, note.

ed.(r) the plaintiff may, if he has evidence of the consideration passing from him to the defendant, and counts in his declaration adapted to it, as in the case of goods sold, money lent, &c. give evidence of that consideration, and recover on those counts

Possession of a bill is evidence of an authority to demand payment of its contents. *ibid.*

Yet in a subsequent case, in an action by the endorser, (i. e. the payee,) against the acceptor of a bill of exchange which had been endorsed several times, the mere possession of the bill was not considered evidence that the endorser had paid the subsequent endorsees, which must be proved to entitle him to recover. *Gorgerat v. M^r Carty*, 2 Dall. Rep. 144.

But the possession of a negotiable bond is *prima facie* evidence that the endorsee has paid the endorser. *Dook v. Caswell*, 1 Hayw. Rep. 18. *Strong v. Spear*, *ibid.* 214.

Though only one satisfaction can be recovered, execution for costs may be issued in all the actions brought against the several parties to a promissory note. *Taria v. Morris*, 2 Dall. Rep. 115. *Gilmore v. Carr*, 2 Mass. Rep. 171. *Porter v. Ingraham*, 10 Do. 88.

Where one sett of a bill of exchange is returned after protest for non-acceptance to the drawer, it destroys the negotiability of the other setts. *Ingraham v. Gibbs et al.* 2 Dall. Rep. 134.

In bills drawn in the *United States* payable in *Europe*, the custom of merchants in this country does not, it would seem, require in a protest for non-payment, that a protest for non-acceptance should be produced, the bills were not accepted. *Brown v. Barry*, 4 Dall. Rep. 365. *Clarke v. Russel*, 3 Do. 415. Vide *Wilson v. Lenox*, 1 *Cranch's Rep.* 195.

Whether *inlebitatus assumpsit* will lie by the endorsee of a bill of exchange against the endorser. *Wood v. Luttrell*, 1 *Call's Rep.* 232.

In *Virginia*, debt will not lie against the acceptor of a bill of exchange. *Smith v. Sagar*, 3 *Hen. Et Munsf. Rep.* 394.

Damages are to be recovered on a bill according to the law of the place where it is drawn. *Schermerhorn v. Pelham*, *Rep. in Co. of Conf.* 454.

One partner may sue on a note endorsed to him by the other partner in the name of the firm. *Sneed v. Mitchell's exrs.* 1 *Hayw. Rep.* 289.

Whether on a count for money *had and received*, notice of non-acceptance or non-payment be necessary to charge an endorser who knew at the time of the endorsement the drawer had no right to draw. *Fenwick v. Seure*, 1 *Cranch's Rep.* 260.

In *Virginia*, an endorsee of a promissory note cannot maintain an action against a remote endorser for want of privity. *Mandeville v. Riddle*, *ibid.* 290. Vide *Dunlap v. Silver*, *ibid.* 367.

In *Maryland*, debt will not lie on a promissory note. *Lindo v. Gardner*, *ibid.* 343. Vide *ibid.* 364.

A protest is not necessary to charge an acceptor with the principal of a bill of exchange, but it is materially so to charge with interest for non-payment. *Lang v. Brailsford*, 1 *Bay's Rep.* 222.

A formal protest by a notary, is not necessary in the case of an inland bill of exchange or a note. *Payne v. Winn*, 2 *Bay's Rep.* 374.—*AM. Ed.*

(r) Bank checks are not within the Act of Congress of 6th of *July*, 1797, laying a duty on stamped paper. *Conroy v. Warren*, 3 *Johns. Cas.* 259.—*AM. Ed.*

for though the instrument is void, the law implies a promise to pay the money due on the consideration.

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exchange, &c.

The first and most simple case is that of an *action by the payee, against the maker of a note, or acceptor of a bill of exchange*. In this case the only proof necessary is, that the name subscribed to the note, or acceptance of the bill, is the hand writing of the defendant, or that of some person specially authorised, or usually entrusted by him, to sign such instruments, or if in the case of a bill the acceptance were verbal, the circumstances under which it was made. By accepting the bill, with sight of it, the hand writing of the drawer is admitted, and therefore need not be proved; but if the bill were never shewn to the acceptor, the hand writing of the drawer must be proved also. It was long considered as a general rule, subject to no exception, that it was not necessary to prove any presentment for payment, in an action against the maker of a note, or the acceptor of a bill. A practice, however, having been adopted of late years, of making notes payable at a particular place, and of accepting bills so payable; several cases came before the different Courts, and not only were some nice distinctions taken, but a difference of opinion prevailed between the Courts upon the subject. At length a case went by writ of error to the House of Lords, where it was solemnly decided, that if an acceptance be made on a bill payable at a particular place, the plaintiff in his declaration must aver, and of course prove on the trial, a presentment for payment at that place. The like evidence would be required in an action against the maker of a note payable at a particular place; though in some cases, prior to the above decision, a distinction had been taken between its being made so payable in the body of the note, or by a separate memorandum on another part of the paper, on which the note was written.(1) But though it is necessary in these cases to prove a presentment at the place appointed, yet it is not incumbent on the holder to prove that notice of the refusal was given to the acceptor, whether the action be against him or against the endorser;(2) for the presentment at the place appointed is a presentment for the agent of the maker or acceptor who has appointed that place for payment, for whose default he must be answerable without further notice.

Wilkinson v.
Lutwidge,
Stra. 648.

Rowe v.
Young, D. P.
2 B. & B. 165.

(1) Edwards
v. Dick, 4 B.
& A. 212.

(2) Smith v.
Thatcher,
1b. 200.
Treascher v.
Hinton, 1b.

If the action be brought by an *endorsee*, it is also required to prove the hand writing of the first endorser, and of the others likewise, if their endorsements are stated in the declaration; but if not so stated, the proof of the first endorsement only is necessary.(3) This evidence is sufficient in common cases; but where

(3) Smith v.
Chester, 1 T.
Rep. 654.

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- (1) *Peacock v. Rhodes*, Doug. 611.
(2) Stat. 58. Geo. 3, c. 93.
(3) *Bowyer v. Hampton*, 2 Stra. 1155.
(4) *Edwards v. Dick*, 4 Barn. & Ald. 212.
(5) *Sanderson v. Judge*, 2 H. Bla. 509.
(6) *Shaw v. Parkham*, Peak. N. P. 165. *Langdon v. Hull*, 5 Esp. Cas. 156.
(7) *Lambert v. Pack*, Salk. 127. Lord Raym. 443. *Critchlow v. Parry*, 2 Campb. 182.
(8) *Gale v. Walsh*, 5 T. Rep. 239.

(9) 12 Mod. 845. Ante, 110.

a bill or note has been stolen from the real owner, or given on a bad consideration, it will be incumbent on the holder to prove that he had received it *bona fide* for a valuable consideration ;(1) and this will now make the note good in his hands, though originally tainted with usury.(2) If founded on the consideration of money won at play, it still continues void against the maker or acceptor, though in the hands of an innocent endorsee ;(3) but the payee or drawer to whom it was given for money won by him, and who endorses it to a third person for good consideration, cannot, on payment being refused by the maker or acceptor, make the original want of consideration a defence to the action against himself.(4)

In actions *against the endorser* his endorsement must be proved, and also that the bill was presented for payment or acceptance, and refused, and that due notice was given to the defendant of that fact ; which may be done by proof that a letter containing such notice was put in the post-office, and directed to him ;(5) but no evidence can be given of such letter, without notice to the defendant to produce it.(6) The hand writing of the drawer, and all previous endorsers, being admitted by the defendant's endorsements, need not be proved.(7)

The like evidence, and also the defendant's hand writing, must be given in an action *against the drawer*.

In the case of foreign bills, the non payment, &c. by the drawee can be proved by no other evidence than the protest ;(8) which protest, if made in a foreign country, proves itself without further evidence.(9)(e)

(e) A bill drawn in the *U. States* on any part of the *U. States*, is an inland bill. *Miller v. Hackley*, 5 Johns. Rep. 375. Contra *Lonsdale v. Brown*, C. C. Oct. 1821, *M. S.*

A bill of exchange drawn by a person in *Charleston*, on a person in *N. York*, is a foreign bill, and if not protested for non-acceptance, though notice be given of its being dishonoured, the holder makes it his own and discharges the endorser. 1 *Rep. Const. Ct. S. Car.* 100.

A bank check is substantially an inland bill of exchange, and the rules which are applicable to the one, are generally applicable to the other. *Cruger v. Armstrong et al.* 3 Johns. Cas. 5.

A protest for non-payment, must appear under a notarial seal ; but it is not necessary that the non-acceptance should be certified in the protest ; for that may be sufficiently established by other evidence. *Morris v. Foreman*, 1 *Dall. Rep.* 193.

Protest in case of non-payment or non-acceptance, is unnecessary, in the case of an inland bill of exchange. *Miller v. Hackley*, 5 Johns. Rep. 375.

After bill has been protested for non-acceptance, and due notice given, protest and notice, in case of non-payment, are not necessary to charge the endorsers. *ibid.*

If several partners draw a bill in the name of the firm upon one who is a member of it, no notice of the dishonour is necessary, for each must be presumed consant of the acts of the other ;(1)(*l*) and in the common case of a bill drawn by *A.* on *B.* where the drawer said before the bill became due that it would not be paid, it was held to be unnecessary to give any notice to him of the subsequent dishonour.(2) So if the drawer have no effects in the hands of the drawee at the time, proof of this fact will excuse the want of notice to the drawer in the case of an inland bill, or of a protest in a foreign one ;(3) though in an action against the endorser, who has no concern with the accounts between the drawer and acceptor, the regular evidence must be given ;(4) but even here if the endorser expressly promise to pay it after its dishonour, this is sufficient to charge him, whether such promise be made to the plaintiff, or any other person at that time a holder of the bill.(5)

When the *drawer* brings an action *against the acceptor* for not paying the bill to a third person,(6) or his order, he must prove the acceptance, that the bill was presented for payment, dishonoured, and returned to him. The bare production of the bill with a receipt endorsed on the back of it, will not be sufficient, for that is *prima facie* evidence of a payment by the acceptor.(7)

Of the evidence in actions on policies of assurance.

ANOTHER simple contract, which is always reduced into writing, is a policy of assurance.(*u*)

A protest of an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it. *The Union Bank v. Hyde*, 6 *Wheat. Rep.* 572.

The certificate of a notary public, under his notarial seal, is *prima facie* evidence, that the person who uses it, and signs a certificate, is a notary commissioned by the Governor. *Browne v. Phil. Bank*, 6 *Serg. & R. Rep.* 484.

A notarial protest is evidence of notice to the endorser of a promissory note, and non-payment of the drawer, *ibid.*—*AM. ED.*

(*s*) If one partner, in a voyage on joint account, be authorised by the others to take money on the credit of the whole concern, and draw bills therefor on a house in *Amsterdam*, and the partner take up money and draw a bill for the same, directing it to be charged to the account of all the partners, but it is signed by himself only, it seems such bill is binding on all the partners; at least equity will enforce payment thereof against all the partners, in favour of the payee of the bill, who has trusted the money on the faith of the joint credit. *Van Reimsdyk v. Kane*, 1 *Gall. Rep.* 630.—*AM. ED.*

Insurance.

(*u*) The digest of cases on the law of insurance, are collected in as small a space, as their number and importance will admit.

Ch. II. s. 1.
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exchange, &c.

(1) *Porteous v. Parker*,
Camp. 82.

(2) *Brett v. Levett*, 13
East, 213.

(3) *Bickerdike v. Bollman*, 1 T.
Rep. 409.

(4) *Wilkes v. Jacks*, Peake
N. P. 302.

(5) *Lundie v. Robertson*, 7
East, 231.
Potter v. Raworth, 13
East, 418.

(6) *Simmonds v. Parminter*,
1 Wils. 185.

(7) *Scholey v. Walsby*,
Peak. N. P.
25.

Policies of
Assurance.

To support his action on this instrument the plaintiff must prove the defendant's subscription, and the interest of the plaintiff or other persons in whom the interest is stated to be. The

The policy and its construction.

The risk undertaken in a policy of insurance is to be described with reasonable and convenient certainty, and the insurers are not liable for any loss incurred in any voyage or risk, materially different from the risk described. *Marby v. The U. States Marine & Fire Insurance Company*, 9 Mass. Rep. 85.

A *respondentia* interest, as well as a bottomry, must be specifically described in the policy. *Jennings v. Ins. Comp. Penn.* 4 Binn. Rep. 244.

All goods, the traffic in which is not prohibited by the law of this country, are lawful goods within the meaning of the policy. *Seton et al. v. Low*, 1 Johns. Cas. 1, S. P. *Gardiner et al. v. Smith*, *ibid.* 141. *Skidmore et al. v. Desdaisy*, 2 Johns. Cas. 77.

A contract of insurance made on a voyage which is opposed to the Common Statute, or Maritime laws of the country where it is effected, is void. *Craig v. The U. States Ins. Comp.* 1 Peter's Rep. 410.

Sailing under a British license during the war between the United States and England, rendered the voyage illegal. *ibid.*

A factor who has a lien on goods in his possession, has an insurable interest. *Russell v. The Union Ins. Comp.* C. C. April, 1806, M. S. Rep.

Although they be contraband of war, *ibid.* *Juhel v. Rhinelander*, 2 Johns. Cas. 120. S. C. in *Fr. ibid.* 487.

Or the traffic in them, prohibited by treaty with foreign nations. *Seton et al. v. Low*, 1 Johns. Cas. 1.

Or owned by the subject of a belligerent nation. *Skidmore et al. v. Desdaisy*, 2 Johns. Cas. 77.

The owner of a vessel mortgaged, or hypothecated, has an interest which he may insure generally, and without specifying its nature. *Kenny v. Clarkson et al.* 1 Johns. Rep. 385. *Higginson v. Dall*, 13 Mass. Rep. 96.

Where the policy states the insurance to be for account of *A.* it is equivalent to a representation that *A.* is owner. *Kimble et al. v. Rhinelander et al.* 3 Johns. Cas. 130.

If any of the terms used in the policy have, by the known usage of trade, or by use and practice, as between insurers and assured, acquired an appropriate sense, they are to be construed according to that sense. *Cost et al. v. Com. Ins. Comp.* 7 Johns. Rep. 385.

Goods laden on deck, are not covered by a policy on goods or cargo, unless expressly mentioned. *Lenox v. The United Ins. Comp.* 3 Johns. Cas. 178.

Quere, Whether a parcel insurance is valid, *dubitat*. *Smith et al. v. Odlin*, 4 Yeates' Rep. 468.

To determine a question of sea worthiness, the nature of the voyage is to be considered. *Bell v. Read et al.* 4 Binn. Rep. 127.

Where a master of a ship insured the property on board, whose only interest was his commissions on the homeward cargo, it was held that such commissions were insurable. *Holbrook's adm. v. Brown*, 2 Mass. Rep. 280.

The plaintiff, in expectation of goods to be shipped, on his account and risk, on board a certain vessel, effects an insurance; no such goods are shipped, but certain other goods are consigned to him in the same vessel on account and risk of the shippers, of whom the plaintiff was a creditor and general agent; a partial loss ensues;

interest in the ship may be proved by possession, or acts of ownership, without the production of the register; (1) and indeed the certificate of registry is no evidence of the plaintiff's interest

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but the plaintiff cannot recover against the underwriter for such loss, and shall have a return of premium *Toppan v. Atkinson, ibid.* 365. *Murray et al. v. Col. Ins. Comp.* 11 *Johns. Rep.* 302. *Fontaine v. Phoenix Ins. Comp. ibid.* 293.

(1) *Robertson and another v. French,* 4 East, 130. Vide Park's Insurance, 406. *Russell v. Borne, 2 Stra.* 1127.

Neither a loss of the proceeds of the outward cargo, destroyed by fire at a foreign port, nor damage to the vessels from worms and climate, nor an extraordinary expenditure of provisions by seamen or centinels placed on board by the government, nor the possible earnings of a vessel during an embargo, are losses within a policy of insurance, against the usual risks on a vessel and cargo, *to, at and from* a foreign port, for the purpose of selling the outward, and purchasing a return cargo. *Martin et al. v. The Salem Ins. Co.* 3 *Mass. Rep.* 420.

Where a vessel is insured *at and from Calcutta* to a port of discharge in the *United States*, and was proved to be not seaworthy *when she sailed*, yet the policy was held to attach, and that the insured were not entitled to a return of premium. *Taylor v. Lowell,* 3 *Mass. Rep.* 331. Vide *Peters et al. v. Phoenix Ins. Co.* 3 *Serg. & R. Rep.* 25.

So, where a policy of insurance is effected on effects on board a ship from *Bordeaux to India*, the risk to finish when the ship shall have safely arrived, the cargo landed and invested in the produce of *India*. Another insurance is effected upon effects on board the same ship in *India* to a port of discharge in the *United States*, with liberty to stop and trade at the *Isle of France, &c.* the risk "to commence when the outward insurance ceases, which it was understood was to continue till the outward cargo of merchandise and money was disposed of, and the return cargo on board." The ship arrived at *Sumatra*, disposed of part of the cargo for produce, with which, and the remainder of the outward cargo, on the report of hostilities between *Great Britain and France*, she departed for the *Isle of France*, where the remainder of the outward cargo was invested in the produce of the island, and the ship arrived safely to the *United States, ibid.*

It was held, that the second policy attached, and therefore that the premium was not returnable. *Cleveland v. Pettypluce et al. ibid.* 392.

An insurance "on the cargo or freight of a ship both or either to the amount insured, valued at the sum insured," is an insurance of freight or cargo, if in the event of assured having only one species of interest on board; and if he have both, then it is an insurance upon both, proportionably to the interests of the assured, in the subjects respectively. *Faris v. Newburyport Ins. Co. ibid.* 476.

An assignment of a policy without notice to the underwriters, vests an equitable interest in the assignee *Walsfield v. Martin,* 3 *Mass. Rep.* 558.

Same point in *New York.* *Earl v. Shaw,* 1 *Johns. Cas.* 313. See vide *Carroll et al. v. The Boston Mar. Ins. Co.* 3 *Mass. Rep.* 515.

When an insurance is made by one in his own name only, on property valued, and it afterwards appeared that the insured was owner but of a moiety, he shall recover but a moiety of the sum insured, in case of a loss. *Dumas v. Jones,* 4 *Mass. Rep.* 647. *Russell v. The New England Mar. Ins. Co. ibid.* 92. *Pearson v. Lord,* 6 *Do.* 81. *Lawrence v. Van Horne,* 1 *Caines' Rep.* 276.

Under a policy on a *chariot*, "free from average," but in which jettisons make one of the perils insured against, if the box of the chariot be thrown overboard in a storm, it is a total loss, and the insured is entitled, on abandoning, to recover as for such, though the carriage be on deck. *Judah v. Randall,* 2 *N. York Cas. in Er.* 324. *Gardiner et al. v. Smith,* 1 *Johns. Cas.* 141. *Vandenheuvel v. U. States Ins. Co.* 1 *Johns. Rep.* 426. *Moses et al. v. Col. Ins. Co.* 6 *Do.* 219.

A policy on goods "until twenty-four hours after they are landed," continues

Y y

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(1) *Pirie v. Anderson*,
4 Taunt. 652.

without also proving possession.⁽¹⁾ Where the insurance is on goods, the interest in them has been generally considered as proved by production of all the usual documents, such as bills

twenty-four hours after all the goods are landed. *Gardiner v. Smith*, 1 Johns. Cas. 141.

If a policy contains the usual warranty, "that corn, &c. shall be from average under 7 per cent, unless general," the insured can only recover for general average, or for an actual as distinguished from a technical total loss. *Le Roy v. Gouverneur*, *ibid.* 226. *Magrath et al. v. Church*, 1 Caines' Rep. 196. *Neilson et al. v. Col. Ins. Co.* 3 Do. 108. S. C. On a new trial, 1 Johns. Rep. 301.

The date of a policy is not conclusive evidence of its execution. *Earl v. Shaw*, 1 Johns. Cas. 313.

A policy with a written clause "against all risks" was held to protect the insured against every loss happening during the voyage, except such as might arise from his own acts. *Goix v. Knox*, *ibid.* 337.

If a vessel be described as an "American ship," it is an implied warranty that she is American, *ibid.* S. P. *Murray v. The U. States Ins. Co.* 2 Johns. Cas. 168. *Barker v. The Phoenix Ins. Co.* 3 Johns. Rep. 237. *Vandenhoevel v. The U. States Ins. Co.* 2 Johns. Cas. 127. Reversed in the Court of Error. *ibid.* But the ground of reversal was upon the question of the conclusiveness of foreign sentences. *Huskin v. The N. York Ins. Co.* *ibid.* 173, n. *Muckie v. Pleasants*, 2 Binn. Rep. 370. *Higgins v. Livermore*, 14 Mass. Rep. 106. *Atherton v. Browne*, *ibid.* 152. *Vandenhoevel v. Church*, 2 Johns. Cas. 173, n.—Vide ante, 105, note (z.)

A warranty of American property amounts to an engagement, not only that the property was American, at the time of insurance, but that it should not lose that character during the voyage, by any act or omission of the assured or his agents, and that it should have all the necessary documents to establish its neutrality, if questioned, required by treaty, or by the law of nations. *Calbraith v. Gracie*, C. C. April, 1805, M. S. Rep. *Calhoun v. Ins. Co. Penn.* 1 Binn. Rep. 293. *Griffith v. Ins. Co. N. America*, 5 Do. 464. *Ludlow v. Union Ins. Co.* 2 Serg. & R. Rep. 119.

The clause of warranty "free from any charge, damage, or loss, which might arise in consequence of seizure or detention of the goods, for or on account of any illicit or prohibited trade," was introduced into the policies of this country, about the year 1788, to prevent disputes concerning losses by seizure for breach of the revenue laws of foreign countries. *Smith v. Del. Ins. Co.* 3 Serg. & R. Rep. 82.

When the plaintiff may recover the whole amount insured, although having an interest only in part. Vide *Davis v. Boardman*, 12 Mass. Rep. 80.

A policy contained a memorandum "that salt, &c. and all articles that are perishable in their own nature, are warranted by the assured free from average unless general, &c. and sugar, &c. skins, hides and tobacco, are warranted free from average under 7 per cent, unless general," a quantity of deer skins, part of the cargo, were damaged, by which a loss of 10 per cent. on the cargo was occasioned. It was held that the deerskins were included under the last clause, and therefore the assured was entitled to recover. *Bakewell v. The U. States Ins. Co.* 2 Johns. Cas. 246.

A vessel insured, with an exception of French risks, was captured by a French privateer, and after being detained four days, re-captured by a British frigate, and condemned as French property; it was held the insured could not recover. *Roget v. Thurston*, *ibid.* 248.

Where dried fish was enumerated as free from average, it was held not to extend to pickled fish. *Baker v. Ludlow*, *ibid.* 289.

In a policy on a vessel at a distant port, from whence she is to sail, and stated to be there on a certain day; "at and from" mean the day on which she is mentioned

of parcels, costs of outfit, the bills of lading signed by the master, specifying the goods received on board, and for whom he is to carry them, custom-house clearances, and such other papers

to be there, and the policy takes effect from thence. *Kemble v. Bowne*, 1 *Caines' Rep.* 75.

The *two per cent.* deducted from a total loss, is, in cases of disaster, a part of the premium, *ibid.*

A general policy without any warranty made by a neutral, covers war risks of all kinds and against all countries, and a false clearance is immaterial, and need not be disclosed. *Barnwall v. Church*, *ibid.* 217.

Under a policy on goods, the insured need not disclose that his interest is only of an undivided part, but may recover according to his interests. *Lawrence et al. v. Vanhorne et al.* *ibid.* 276. *Lawrence v. Sebor*, 2 *Do.* 203. *Post et al. v. The Phoenix Ins. Co.* 10 *Johns. Rep.* 79.

A representation, that a man has been naturalised "*since*" a particular time does not mean "*ever since*." *Coulon v. Bowne*, 1 *Caines' Rep.* 238

If both insured and insurer on a policy containing the usual clause of warranty against contraband goods, know there are contraband goods on board, the warranty will apply only to the goods insured. *Bowne v. Shaw*, *ibid.* 489.

In a policy on commissions on lawful goods, the warranty against contraband is not broken, though the assured be captain and consignee of illicit articles, shipped on board without the knowledge of the underwriter. *Depeyster et al. v. Gardner*, *ibid.* 492.

In a policy effected in *New York*, on goods at *twelve cents* per pound, the weight will be determined by the *English* standard, though the invoice specify the weight to be *French*. *Gracie v. Bowne*, 2 *Caines' Rep.* 30.

A voyage from one port to another through an intermediate port, where the goods are to be landed and re-shipped to the port of their ulterior destination, may be insured as a voyage from the first to the second port, without mentioning the third port. *Steinbach v. The Col. Ins. Co.* *ibid.* 129.

When a policy is clear, certain, and unambiguous, as to the voyage insured, propositions asking the rate of insurance for another voyage, cannot be resorted to, to shew that the voyage insured was meant to be restricted to that described in the proposition. *Vandervoort et al. v. Smith*, *ibid.* 155. *Hogan v. Del. Ins. Co.* *C. C. April*, 1806. *M. S. Rep.* *Cherlot v. Barker*, 2 *Johns. Rep.* 346.

If the acting partner in a concern of two, cause an insurance to be effected for the amount of his own share, and the policy state it to be on his own account, but retain the general printed words, "*whosoever else it may concern*," the insurance will be held to have been made on the joint account, if such appear to have been the intention of the assured from his letters, which may be resorted to, though never shewn to the underwriter, who subscribed on seeing instructions to insure only on the separate account of the acting partner; under such circumstances, if the policy be for half the cargo, and on capture half be condemned and half be acquitted, the assured can recover only a moiety of the sum insured. *Lawrence v. Sebor*, 2 *Johns. Cas.* 203.

If an insurance be on a return cargo, beginning the adventure "*from and immediately after loading thereof on board the said vessel*" at the port of destination, with liberty to touch and trade at the intermediate ports, the policy will not cover the outward cargo from the port of destination to one of the intermediate ports, though the vessel was obliged to carry it there in consequence of her being refused permission to enter that of her destination. *Graves v. Marine Ins. Co.* 2 *Caines' Rep.* 338.

If the articles contained in the memorandum in a policy respecting *corn*, &c. physically exist, the underwriter is not liable for a total loss on account of their being

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as may be thought necessary to substantiate his right to the property.

The plaintiff must then prove that the ship sailed on her voy-

perfectly rotten; and when the assured rests on a loss of voyage to warrant his recovery, he should shew it most clearly, and of this a survey is always proof of good faith. *Neilson v. The Colum. Ins. Co. 3 Caines' Rep. 108.*

To bring a case within the warranty, there must be both a seizure and proof of an illicit trade. An allegation that the seizure was made for a prohibited trade, is not enough. *Smith v. Delaware Ins. Co. 3 Serg. & E. Rep. 83.*

And it must expressly appear, by the sentence, that the goods were condemned on account of illicit or prohibited trade. *Faudel et al. v. Phoenix Ins. Co. 4 Serg. & E. Rep. 39.*

Where the policy provides against illicit trade, and the vessel is allowed by the custom house to clear out regularly with illicit articles, yet is the policy thereby vacated. *Tucker v. Fuhel et al. 1 Johns. Rep. 90.*

An insurance was effected with the following memorandum: "The vessel sails under a sea-letter, without a register, property warranted American;" it was held parol evidence could be admitted to prove what was meant by a sea-letter. A certificate of property issued at the custom-house, was a sea-letter within the meaning of the policy. *Sleight v. Rhinelander et al. 2 Johns. Rep. 531.* Contra S. C. in Supreme Court, 1 Johns. Rep. 192.

If a policy contain the words, "on a voyage from New York to Barbadoes and a market," the insured, by the usage of the West India trade, has liberty to go bona fide from island to island in the West Indies until he has sold the whole of his cargo; and he may sell a part of his cargo at one island, and part at another. *Maxwell v. Robinson et al. ibid. 333.*

Where a vessel was valued at 2,000 dollars, and insured for that sum, and there was a prior insurance for 3,000 dollars, the insured was allowed to prove that the vessel was worth enough to cover both policies. *Kenny v. Clarkson et al. ibid. 385.*

Where a printed blank policy on cargo was used, and the blank filled up for an insurance on profits, and the valuation in writing taken in connection with the printed words, was a valuation of the goods and not of the profits, it was held that parol evidence was inadmissible to explain the intention of the parties, there being no ambiguity in the words as they stood. *Murford v. Hallett, ibid. 433.*

Every policy on profits must of necessity be a valued policy. *ibid.*

Where a policy contains no warranty of neutrality, or of the character of the vessel, the insurers take upon themselves all risks, belligerent as well as neutral. *Elting et al. v. Scott et al. 2 Johns. Rep. 157.*

If the national character of a vessel be not warranted or represented, it is not incumbent on the insured to shew that she had a sea-letter, or other proper documents on board, required by the laws of the country, or treaties with foreign powers. *ibid.*

Goods were insured from *Nevitas*, in the island of Cuba, "beginning the adventure, &c. from and immediately following the lading thereof on board of the vessel at *Nevitas* in Cuba;" the vessel sailed with a cargo of goods from New York, and arrived at *Nevitas*, but not being allowed to land the goods, except a few trifling articles, she sailed from *Nevitas* with the outward cargo on board for Jamaica, and while going there was wholly lost by the perils of the sea. It was held that the policy did not attach on the outward cargo, which continued on board at *Nevitas*, and until the vessel was lost, and the insured were only entitled to a return of premium. *Richards v. The Marine Ins. Co. 3 Johns. Rep. 307. S. P. Graves et al. v. Marine Ins. Co. 2 Caines' Rep. 339.*

The insurer is always supposed to be acquainted with the situation and topogra-

age; and, in case there be any warranty in the policy, that he has complied with it; that the loss happened by one of the perils mentioned in the policy, during the course of the voyage,

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phy of the places to which the vessel is destined. *De Longuemere v. N. York Fire Ins. Co.* 10 Johns. Rep. 120.

Misrepresentations to affect a policy will not be presumed. *Pine et al. v. Vanuxum et al.* 3 Yeates' Rep. 30.

A vessel was insured "at and from Calcutta to New York, with liberty to touch at Madras for trade, and to take in part of her cargo there;" the vessel went to Madras, and sailed from thence direct to New York, without ever going to Calcutta; in an action brought by the insured to recover back the premium, it was held he was entitled to recover it, as the risk never attached. *Murray v. The Colum. Ins. Co.* 4 Johns. Rep. 443.

Where the policy never attaches, as if the vessel never sails on the voyage insured, or if it becomes void by a failure of the warranty, there being no actual fraud, the insured is entitled to a return of the premium. *Delavigne v. U. States Ins. Co.* 1 Johns. Cas. 310. *Duguet v. Rhinelandt*, *ibid.* 360. *Murray v. U. States Ins. Co.* 2 Do. 168. *Jackson v. N. York Ins. Co.* *ibid.* 191. *Robertson et al. v. The United Ins. Co.* *ibid.* 250. *Forbes v. Church*, 3 Do. 159. *Graves v. Marine Ins. Co.* 3 Caines' Rep. 339. *Murray v. Col. Ins. Co.* 4 Johns. Rep. 443. *Richards v. Marine Ins. Co.* 3 Do. 307.

Under the usage in respect to missing vessels, interest is to be calculated, in all cases, from the expiration of twelve months and thirty days after the period when the vessel was last heard of. *Hallet et al. v. Phoenix Ins. Co.* C. C. Oct. 1808, *M. S. Rep.*

A vessel was insured from New York to Nantz; the policy contained the following clause: "Warranted not to abandon in case of capture or detention, until six months after proof thereof, or until condemnation; also free from seizure or detention in port, and not to abandon in consequence of being turned away, or for having been carried into a British port." The ship sailed, and had her register endorsed by two British cruisers, "not to enter any port of France," having met with a gale of wind near Belle-Isle, she went there for a pilot, and was chased by a British cruiser under the island's lee, and having taken a pilot on board, she lay to an hour, a league from the shore, and thirty miles from Nantz, in consequence of the fog; and while in this situation, a league and a half from the principal fort, and nearly in reach of cannon-shot, the ship was taken possession of by a French armed boat, carried in under the guns, claimed as a prize, and condemned under the Milan decree; this seizure was held not to be within the meaning of the clause in the policy, that the assured were entitled to recover for a total loss, and the expenses of the captain in endeavouring to obtain a release of the vessel, including the wages of the captain, from the time he left the ship till he arrived at New York, his passage money, with commissions and interest. *Watson v. The Marine Ins. Co.* 7 Johns. Rep. 57.

The insurer on a ship is not liable for any expense, specifically and exclusively for the benefit of the cargo, nor for any sum *per diem* agreed upon by the owner to be allowed the captain while in port. *ibid.*

A policy on merchandise will cover a curricule. *Duplenty v. The Commercial Ins. Co. Anth. N. P. Cas.* 83.

A warranty that "orders will be given that the vessel shall not cruise," is not complied with, unless such orders be expressly given to the captain, and an implication from the general instructions will not be sufficient. *Ogden v. Ash*, 1 Dall. Rep. 162.

Where a policy provided, "in case of a loss, the money shall be paid within three

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and by the means stated in the declaration. In cases of capture, the proceedings in foreign Courts are often necessary. Their effect we have before had occasion to consider.(1)

(1) Ante, 69.

months after proof of the same," proof must be made to the insurer three months before bringing the suit. *Camberling v. M'Call*, 2 Dall. Rep. 280. S. C. 3 Do. 477. 2 Yeates' Rep. 281.

In general, household furniture will be considered part of the cargo, and not baggage. *Vasse v. Ball*, 2 Dall. Rep. 270. S. C. 2 Yeates' Rep. 178.

In an insurance on a vessel for a certain term, "as interest shall appear," the premium is to be augmented or diminished according to the actual cargo on board, from time to time, during the term insured. *Pollock et al. v. Donaldson*, 3 Dall. Rep. 510.

On an open policy, the assured are entitled to recover according to the actual value of the property, and not its cost. *Snell et al. v. The Delaware Ins. Co.* 4 Dall. Rep. 430.

If the policy underwritten in Philadelphia contain a warranty of American property, "to be proved, if required, in this city, and not elsewhere," the assured is entitled to vindicate the truth of his warranty, not only against a foreign condemnation as enemies' property, but against a condemnation for any act or omission of his agent during the voyage, by which the neutrality is alleged to be forfeited. *Calhoun v. Ins. Co. of Pennsylvania*, 1 Binn. Rep. 293. *Calbraith v. Gracie*, 1 Binn. Rep. 296, (n.)

Upon an insurance for goods, the underwriters are not liable for freight paid by the owners of the goods during the voyage. *Gibson v. The Philad. Ins. Co.* *ibid.* 405.

The assignee of a policy takes it like any other chose in action, subject to all defections to which it was liable before the assignment. *Rousset v. The Ins. Co. of North America*, *ibid.* 429. *Gourdon v. Same*, 3 Yeates' Rep. 327. 1 Binn. Rep. 429, n.

A policy on a vessel contained a clause, "that if, after a regular survey, she should be condemned for being unsound or rotten, the underwriters should not be bound to pay their subscription," the survey and condemnation, to come within the clause, must shew unsoundness from decay, and not from accident, as the eating of rats. *Garrigues v. Cox*, 1 Binn. Rep. 592. *Armroyd v. Union Ins. Co.* 2 Do. 394. *Et vide Steinmiz v. U. States Ins. Co.* 2 Serg. & R. Rep. 993.

A vessel, stated in the policy to be the "good British brig called the John," was insured at the usual sea-risk premium, from Havanna to Baltimore, with a written memorandum at the foot of the policy, that the insurance was against the perils of the sea, and was to end on capture. It was held that the words "British brig," even if a warranty, did not imply that she was a British registered vessel, but merely that she was owned by a British subject; and it being proved that the owner was a Scotchman by birth, and that he navigated the vessel under a clearance and license from the British custom-house at New Providence, this was sufficient, *prima facie* to shew that he continued to be a British subject, without shewing his domicile. *Mackie v. Pleasants*, 2 Binn. Rep. 363.

If the insured make a proposition to the underwriters to cancel a policy, which they reject, and afterwards assent to, but before such assent reaches the assured, they hear of the loss of the vessel, the policy is not cancelled. *Head et al. v. Providence Ins. Co.* 2 Cranch's Rep. 127.

If it be inserted in a policy, that "the insurers are not liable for seizure by the Portuguese for illicit trade, "and the vessel be seized and condemned by the Portuguese government for an attempt to trade illicitly, the underwriters are not liable for the loss. *Church v. Hubbard*, *ibid.* 187.

In losses happening by the perils of the seas, where every person perishes, it is impossible to prove the actual loss. In this case presumptive evidence is sufficient ;(1) proof that the ship

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An exclusion of the risk of seizure for illicit trade, means a *lawful seizure*. *ibid.* 236.

(1) *Green v. Brown*, 2 Stra. 1199. *Newby v. Read*, Park.

A policy in the name of one *joint owner*, as property may appear, (the policy not stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint owner. *Graves v. The Marine Ins. Co. ibid.* 419.

Evidence of the knowledge the insurers had of the insured's intention at the time the policy was effected, ought to be very clear to justify a Court of Equity in conforming the policy to that intention. *ibid.*

If a policy contain a clause, "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors that she was unsound and rotten, but not referring to the commencement of the voyage, is not sufficient to discharge the underwriters. *Marine Ins. Co. v. Wilson*, 3 *Cranch's Rep.* 187.

Whether such report, even if it relate to the commencement of the voyage, would be conclusive evidence. *ibid.*

A policy on a ship is an assurance of the ship for the voyage, and not an insurance on the ship and the voyage. The underwriters undertake for the ability of the ship to perform the voyage, not that she shall perform it at all events. *Alexander v. Baltimore Ins. Co.* 4 *Cranch's Rep.* 370. 1 *Hall's Amer. Law Journal*, 397.

A policy will be construed according to the *intent* and *meaning* of the parties, and not the *strict letter*. *Cross et al. v. Shuttiffe et al.* 2 *Bay's Rep.* 220.

Loss by perils, &c.

If a vessel be driven into a port of necessity, and a pestilential disorder break out, which renders it impossible for her to pursue her voyage, it is a loss within the perils of the policy. *Williams v. Smith*, 2 *Caines' Rep.* 1.

If the port, to which a vessel insured is destined, be actually blockaded, it is a peril, within the meaning of the policy. *Schmidt v. The United Ins. Co.* 1 *Johns. Rep.* 249.

A vessel was insured against *sea risks only*, from *New Orleans* to *Cape Nicholas Mole*, and from thence to one other port, say *Port Republican*, *Cape Francois*, or *St. Thomas*; during the voyage she met with bad weather, and became leaky; but while she was in sight of *St. Domingo*, and when seventy miles off *Cape Nicholas Mole*, she was turned away from that port by a *British* cruiser, on account of its being blockaded; she then proceeded towards *St. Thomas*, but by stress of weather was obliged to go to *Jamaica*, where, on a survey she was condemned as not worth the cost of repairs. In an action for a total loss, it was held the deviation from *C. N. Mole*, was excused by necessity, and the loss afterwards was occasioned by the perils of the sea, for which the insurers were liable. *Robinson v. Col. Ins. Co.* 2 *Johns. Rep.* 89.

A leak occasioned by rats, without the neglect of the captain, is a peril within the policy. *Garrigues v. Cox*, 1 *Binn. Rep.* 592.

If the loss arise from the ordinary wear and tear of the voyage, the underwriter is not liable. *Aliter*, if it happen in consequence of the violence of the winds and waves, running on rocks, or the like; and it is not sufficient for the insured to prove that there were storms on the voyage, unless he can fairly trace the injury sustained to that cause. *Coles et al. v. Mar. Ins. Co.* C. C. *April*, 1812, *M. S. Rep.*

departed, and that in the ordinary course of such a voyage, she would have arrived long since, is sufficient to raise a presumption that she perished at sea.

Losses by capture, detention, &c.

Any detention by Princes in amity, embargo, or otherwise, whether the capture be just or unjust, as it is an act of hostility, gives a right to the insured to abandon for a total loss. *Lee v. Boardman*, 3 *Muss. Rep.* 238.

A capture by a *friendly power*, in contradistinction from a capture by an enemy, is equally a ground of abandonment by the insured. *Murray v. The U. States Ins. Co. 2 Johns. Cas.* 263. *Gouverneur v. The U. States Ins. Co. 1 Caines' Rep.* 392.

In case of a restitution of goods captured, after the owner has abandoned to him in the port into which his vessel is carried, he is not bound to send them to their port of destination. *Bordes v. Hallet*, *ibid.* 445.

A vessel and cargo were insured to *St. Lucar*, with a clause, "The assurers take no risk of a blockaded port; but if turned away, the assured to be at liberty to proceed to a port not blockaded;" this clause was held to extend to any loss happening by reason of a blockaded port, whether such blockade were strictly legal or not. *Radcliff v. The U. States Ins. Co. 7 Johns. Rep.* 58.

What constitutes a lawful blockade? *ibid.* S. C. 9 *Johns. Rep.* 277.

It seems that the accidental and temporary dispersion of a blockading squadron by a storm, is not a suspension of a blockade, provided the fleet use all due diligence to resume its station, *ibid.*

A blockade must exist *de facto* to render it unlawful for a neutral to enter. *Williams v. Smith*, 2 *Caines' Rep.* 1.

Wherever a vessel is constrained, against her will, to break up her voyage by a belligerent vessel, it is a good ground of abandonment, and recovery for a total loss. *Symonds v. The Union Ins. Co. 4 Dall. Rep.* 417.

Loss by barratry.

In an action on a policy averring the loss by barratry, if the plaintiff shew a loss from a fraudulent act of the master, the presumption of law is, that it was for his own benefit, and the assured, in order to entitle him to recover, need not affirmatively prove it to be so. *Kenrick v. Delafield*, 2 *Caines' Rep.* 67.

Under a warranty against seizure on account of illicit trade, the underwriter is liable for a loss by illicit trade, *barratrously* carried on by the master. *Suckley v. Delafield*, *ibid.* 332.

In an action founded on the barratry of the master, it is not incumbent on the assured to prove that the master was not the owner; such a fact, if relied upon, must be proved by the assurer. *Steinbach v. Ogden*, 3 *Caines' Rep.* 1.

A fraudulent sale and purchase by a master of a vessel, will not constitute such an ownership as to afford a defence to a claim for a loss by his barratry, *ibid.*

Where the owner of a vessel chartered her to the master for a certain period of time, the master covenanting to victual and man her as his own cost, he is to be deemed owner *pro hac vice*, and no act of his will amount to barratry. *Hallett v. Col. Ins. Co. 3 Johns. Rep.* 272. Vide *Calhoun v. Ins. Co. Penn. 1 Binn. Rep.* 293.

A person contracting and dealing with a master, who had purchased in his owner's vessel, in his capacity of master, may recover under a count for barratry, a loss occasioned by the fraudulent conduct of such master. *ibid.*

M. chartered a vessel to A. and B. for a particular voyage, reserving half the

No precise time is fixed as evidence of a loss, and indeed it must, in every case, depend on the particular circumstances: Ch. II. s. 1. Policies of Assurance.

cabin, and certain privileges for master and mate, and covenanted to hire the crew, furnish provisions, &c. The master, at the request of *B.* who was on board, went out of the course of the voyage, and the vessel was captured by a *Spanish* privateer; it was held *M.* continued the owner of the vessel, and that the master had committed barratry for which the assurers were liable. *M. Intyre v. Bowne*, 1 Johns. Rep. 229.

Barratry is a fraudulent act committed by the master of the vessel from a selfish and sinister design to promote his own interest, without the knowledge or consent of the owner. *Crounillat v. Ball*, 4 Dall. Rep. 294. *S. C.* 3 Yeates' Rep. 375. *Hood's exrs. v. Nesbit et al.* 2 Dall. Rep. 137. *S. C.* 1 Yeates' Rep. 114.

Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustains an injury. *Marcardier v. Chesapeake Ins. Co.* 8 Cranch's Rep. 39.

The insured cannot recover for a loss by barratry, unless the barratry produced the loss; but it is immaterial whether the loss so produced, occurred during the continuance of the barratry, or afterwards. *Swan v. The Union Ins. Co.* 3 Wheat. Rep. 168.

Any trick, cheat, or fraud, and any crime or wilful breach of law, committed by the captain to the prejudice of his owners, is barratry; as the rescue of a neutral vessel, by her own crew, from the hands of the captors, who are taking her in for adjudication. *Wilcocks et al. v. Union Ins. Co.* 2 Binn. Rep. 574. *Doederer v. The Union Ins. Co.* C. C. April, 1807, *M. S. Rep.*

The crew of a neutral vessel, captured and sent in for adjudication, are not obliged to navigate her: it is the duty of the captors to do so; if they fail, they do not take sufficient possession of her, and the neutrals may consider her as abandoned to them; but if an insufficient force be placed on board, in consequence of a promise by the neutral crew to navigate her to the destined port, they are bound; and if, in violation of their promise, they take the vessel into their own hands, it is an unlawful rescue, and an act of barratry. 2 Binn. Rep. 574.

Partial loss.

An insurance was made on *goods*, and a separate policy on the *profits*; the vessel being captured, five-eighths of the *goods* were restored, and received by the owner; the insured abandoned on the policy on the *profits*, but claimed and received an average loss of three-eighths of the *goods*. It was held he could only recover a partial loss of three-eighths on the profits. *Loomis et al. v. Tillinghast*, 2 Johns. Cas. 36.

An adjustment of a loss endorsed on a policy, and signed by the insurer, is not conclusive if it be made on the misrepresentation of the insured, through mistake or design. *Faugier v. Hallett*, *ibid.* 233.

An adjustment made in a foreign country, according to the laws thereof, is not conclusive on the parties, who have entered into the contract here, who are governed only by the laws of *New York*. *Lenox v. The U. States Ins. Co.* 3 Johns. Cas. 178.

If the assured, in consequence of the blockade of the port of destination, accepts his goods at an intermediate port, and pays full freight, and transports them by lighters to the port of discharge, he cannot recover from the underwriters on the goods, either the expenses and freight paid for the transportation in the lighters, or a premium of insurance paid for the risk in the lighters. *Low et al. v. Davy*, 5 Binn. Rep. 595, *S. C.* 2 Serg. & R. Rep. 553.

An adjustment made on a full disclosure of all the circumstances, is final, though

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but by the practice among underwriters a ship is considered as lost, if not heard of for six months together, on a voyage within

Vide Park. 64. some of them may be suspicious. It can only be opened from fraud, or a mistake from facts not known. *Dow v. Smith*. 1 *Caines' Rep.* 32.

Where a vessel captured, re-captured, and carried into a port of the country to which she was bound, and on the way to that of her destination; information being received of all these circumstances at the same time, the assured cannot abandon; and if, in such case, she and her cargo be sold at auction, the charges of sale fall on the assured. *Muir et al. v. U. States Ins. Co.* *ibid.* 49.

If a vessel be captured and acquitted, the insurer is liable to the expenses incurred in prosecuting an appeal interposed against the sentence condemning the assured in costs, and to obtain compensation for damages occasioned by plundering or embezzling, though the expenses surpass the amount of the underwriter's subscription. *Lawrence et al. v. Funhorne et al.* *ibid.* 276.

Whether such expenses be reasonable, is a matter for a jury to determine. *ibid.*

Though an adjustment made by the agent of the underwriters, do not preclude the insurers from shewing errors in it, yet if they do not dissent, they will be bound. *Bordes v. Hallet*, *ibid.* 444.

In making up an account of a loss on an open policy of insurance, the insured cannot charge a commission on the purchase of goods by themselves. *Anonymous*, 1 *Johns. Rep.* 312.

Goods were insured from *New York* to *Bordeaux*, the policy contained the usual printed clause, "to be free from any loss which may arise in consequence of any seizure or detention for or on account of any illicit or prohibited trade," and also a written clause, "warranted not to abandon if turned away, nor if captured till condemned;" the vessel on her voyage was captured and sent into *England*, where, on the 18th *Nov.* 1803, the ship and cargo were released, and the ship afterwards proceeded on her voyage, and reached *Vardun*, at the entrance of the *Garonne*, in *France*, on the 16th *Jan.* 1804. The vessel and cargo were seized and detained by the *French* government, and she not suffered to unlade any of her cargo, and afterwards ordered to leave *France*, as she had come direct from *England*; the ship with her cargo proceeded afterwards to *St. Sebastians* in *Spain*, where part was sold, and she returned in ballast to *Bordeaux*, and the residue of the cargo unsold was shipped to *Bordeaux*, and there sold. On being advised of the situation of the vessel and cargo at *Bordeaux*, the insured abandoned as for a total loss, on the 18th *May*, 1804. It was held, under the written clause in the policy, the insured were only entitled to recover for a partial loss, for expenses and average from the time the vessel was captured until her arrival at *Bordeaux*. *Spreyer v. N. York Ins. Co.* 3 *Johns. Rep.* 89.

Quere, as to the effect of such a prohibition by the *French* government, without the special clause in the policy? *ibid.*

Where the consignee of a vessel advanced money for her repairs, and took a bottomry bond with marine interest, the insurers were held liable only to pay the actual amount of the repairs, and not the bottomry bond. *Reade v. The Commercial Ins. Co.* *ibid.* 352. *Jumel et al. v. Marine Ins. Co.* 7 *Johns. Rep.* 412.

Where goods insured were captured during the voyage, and the vessel was released, but the goods detained for further proof, and were afterwards restored on payment of full freight; and the owner was obliged afterwards to hire another vessel to carry these goods to the place of destination: the insurer was held liable to pay the additional or extra freight, being necessarily incurred from the capture. *Mumford v. The Commercial Ins. Co.* 5 *Johns. Rep.* 262.

The defendant underwrote an open policy from *Philadelphia* to *Jamaica*, on a vessel which was captured and recaptured, and taken into *Jamaica*, where, by agree-

any part of Europe; or twelve months, if bound to a greater distance.

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ment of the parties, without going into the admiralty, she was sold at public sale for one-fourth of the sum insured, and bought by the captors for the original owners, who afterwards acquiesced in the purchase, and now sued for a total loss. It was held the insured could only recover for the salvage, charges, and loss of time. *Story et al. v. Strettell*, 1 *Dall. Rep.* 10.

In certain cases, it is not requisite, in order to recover an average loss, that the plaintiff should produce the invoice or prime cost of goods damaged. *Bentloe v. Pratt*, 1 *Wall. Rep.* 61.

In an action on a policy, where the plaintiff declares for a total loss, and proves a capture and condemnation of property which he has never abandoned; the jury may estimate the value of the *spes recuperandi*, deduct it from the whole sum insured, and find the remainder as a partial loss. *Watson et al. v. The Ins. Co. of North America*, 1 *Binn. Rep.* 47. *S. C. 4 Dall. Rep.* 283.

TYLSEMAN C. J. says, in *Brown v. Phoenix Ins. Co.* 4 *Binn. Rep.* 464, "that he does not consider the law as settled by this decision. There are weighty objections to the principle adopted by the Court in this case."

It depends on the particular circumstances of the case, whether, if the vessel be captured and re-captured, the loss will be deemed *total* or *partial*. *Marine Ins. Co. v. Tucker*, 3 *Cranch's Rep.* 357.

The usage of trade may be proved by parol evidence, although such usage originated in written law or an edict of the government of the country where it prevails. And no acts, justifiable by the usage of trade, and done by the insured to avoid confiscation under the laws of the country where she is trading, will avoid the policy. *Livingston et al. v. Maryland Ins. Co.* 7 *Cranch's Rep.* 506.

Total loss.

A vessel insured is taken by a *French* cruiser, re-taken by a *British* frigate, libelled in the *English* Court of Vice-admiralty, and decreed to be sold for payment of salvage; the master purchases her, returns, and delivers her to the assured, who, without any abandonment, credits the underwriters with the proceeds of the sale. It was held to be a total loss; that the underwriters are entitled to the nett proceeds of the sale received by the master, and to no more; that the assured were not bound to abandon, but may retain the vessel. *Storer v. Gray*, 2 *Mass. Rep.* 565.

To constitute a *technical total loss* of a ship from the perils insured against, she must be injured to the amount of *half* her value, or more, after deducting the *one-third* old for new allowed the underwriters; or, in other words, she must be injured to the extent of *three-fourths* of her value, or more. *Smith v. Bel*, 2 *N York Cas. in Er.* 153.

Where the assured recovers for a total loss, the sum shall be the invoice price of goods, without deducting the drawback allowed on exportation. *Gahn et al. v. Broome*, 1 *Johns. Cas.* 190.

Where a ship being insured, was compelled on her voyage by storm to put in for repair, her cargo was, for fear of being spoiled, sold, and the voyage broken up; but the vessel might have been repaired for less than half its value; it was held that these facts did not entitle the insured to recover for a total loss on the policy on the ship. *Goold et al. v. Shaw*, *ibid.* 293.

An insurance was made on goods from *New York* to *Barracoa*, with liberty to touch at one or two ports north side of *Cuba*, to continue until the cargo was safely landed at these places; the vessel arrived at *Barracoa* on the 20th *June*, and staid there till the 30th *October* following, without being able to sell but a small part of

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Where the defendant adjusted an account of an average loss, and endorsed the policy thus, viz. "agreed to pay 44*l*. 6*s*. 6*d*."

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Galbraith,
Guildh. Sit-
ting after T.
25 Geo. 3.
M. S.

the cargo, and not any goods of the insured; the vessel was forcibly entered by pirates, who carried away 4780 dollars in money, and a great quantity of goods; she then set sail for *Havanna*, but was compelled by distress to put in at *New Providence*, where the remaining goods were sold for 3701 dollars, the invoice amount of the cargo being 16,500 dollars; the voyage being broken up, an abandonment was made for a total loss, and the plaintiff was held entitled to recover for a total loss. *Gilfert v. Hallett et al. 2 Johns. Cas. 396.*

If a vessel be rendered by the perils insured against, unable to proceed with her original cargo, it is a loss of the voyage, though she may be able to perform it with another more buoyant. *Abbott v. Broome, 1 Caines' Rep. 292.*

Where a vessel and cargo were captured, and the proceedings in the Admiralty Court were against the whole cargo and part condemned, and the residue released, and to prevent an appeal, and avoid further detention, the master agreed to pay a specific sum as a ransom, and sold a part of the cargo, being more than a moiety of the part insured, to defray the expenses and pay the ransom; it was held, that the sum paid for the expenses and ransom was not general average; but must be borne by the cargo alone, that the assured was entitled to recover as for a total loss. *Vandenheuevel v. The United States Ins. Co. 1 Johns. Rep. 406.*

Where the vessel and cargo were captured, and the owner of the goods abandoned them to the insurer, and also abandoned his interest to the insurers on the profits, it was held that he was entitled to recover against the latter as for a total loss, notwithstanding a previous abandonment of the goods to the insurers on the cargo, who received them after their release by the captors, and sold them to a profit. *Mumford v. Hallett, ibid. 433.*

The insured was supercargo, and by contract was to receive certain commissions out of the return cargo; on the homeward voyage the vessel was obliged, by stress of weather, to put into a port, where the cargo was sold from necessity, and a part of the proceeds invested in other articles, and brought home; the supercargo here effected a policy on his profits, on the refusal of the owners to pay him, abandoned to the insurers, and brought his action for a total loss, as the return cargo did not arrive, the insured lost his commissions, and was held entitled to recover for a total loss. *The New York Ins. Co. v. Robinson, ibid. 615.*

The cargo of a vessel was insured from *North Carolina* to *New York*; the vessel sailed the 16th *February*, 1802, and was never heard of afterwards: an abandonment was made on the 17th *February*, 1803, to the insurers, and proofs of the time of sailing and interest were exhibited; the length of time since the vessel was heard of afforded presumptive evidence of a total loss, and no abandonment was necessary. *Gordon v. Bowne, 2 Johns. Rep. 150.*

It seems no precise time is fixed on to raise the presumption of a loss, but each case must depend on its own circumstances. *ibid.*

Insurance was on a ship and freight, at and from *Amsterdam* to *Philadelphia*, each subject being separately valued. On the voyage the ship suffered so much from tempestuous weather as obliged her to go into an *English* port to refit. Her repairs exceeded half her value. While she was in port refitting, the assured offered to abandon the ship and freight to the underwriters. The abandonment of the ship was accepted, and a total loss paid; that of the freight was refused. The ship pursued her voyage, and delivered her cargo in good order at *Philadelphia*, and the freight named was the same as if the ship had met with no disaster. It was held that the underwriters were still liable for a total loss of the freight, according to the valuation in the policy; and this, notwithstanding it had been greatly

for particular average on this policy, payable in one month," and the underwriters afterwards expressed doubts about the loss,

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overvalued. *Coolidge et al. v. The Gloucester Marine Ins. Co.* 15 *Mass. Rep.* 341.

Where a vessel was insured from *New York* to *Havanna*, and she set sail on the voyage about 9 o'clock, A. M. of the 25th *December*, 1807, and just before she got under weigh, the pilot heard that an embargo had taken place, and before she got out of port was stopped by virtue of the *American* embargo of 22d *December*, 1807; the voyage was held to be commenced before the detention, and that the insurer was liable to a total loss. *Walden v. Phoenix, Ins. Co.* 5 *Johns. Rep.* 310. *M^r Bride v. Marine Ins. Co.* *ibid.* 299. *Ogden v. N. York Firemen Ins. Co.* 10 *Do.* 177. *Odlin v. Ins. Co. Penn. C. C.* April, 1809, *M. S. Rep. S. C.* 2 *Hall's Law Journal*, 905.

The *technical* total loss, arising from capture, ceases with the final decree of restitution, though the decree may not have been executed at the time of the offer to abandon. *Marshall v. The Del. Ins. Co.* 4 *Cranch's Rep.* 202.

The loss of the voyage as to the cargo, is not a loss of the voyage as to the ship. *Alexander v. Baltimore Ins. Co.* *ibid.* 370.

Vide title *abandonment*.

Abandonment.

To entitle the insured to abandon, there must be, at some period during her voyage, a total loss either real or constructive. *Wood v. The Lincoln & Kennebeck Ins. Co.* 6 *Mass. Rep.* 479.

And the insured has the right of abandoning so long as the loss continues total. *Dorr v. The New England Ins. Co.* 11 *Do.* 1.

The insured must give reasonable notice of his intention to abandon, otherwise he waives his right so to do; and where the insured were informed, on the 17th *October*, of the detention of the vessel, and did not give notice of the intention to abandon till the 20th *November* following, he was held to have waived his right. *Livermore v. Newburyport Ins. Co.* 1 *Mass. Rep.* 364. *Smith et al. v. Same*, 4 *Do.* 668. *Murray v. Hatch*, 6 *Do.* 465.

A ship is insured, and is captured and re-captured, libelled and ordered to be restored, on payment of one-half the value as salvage, and sold for want of such salvage being paid, the master becomes the purchaser, on his return delivers her to her former owners, after which the insured offer to abandon the proceeds of the sale but not the ship, and the underwriters refuse to accept the abandonment as offered, it was held the assured were entitled to recover for a *partial* loss. *Oliver v. Newburyport, Ins. Co.* 3 *Mass. Rep.* 37.

Assured may abandon while the ship is captured, and such abandonment fixes the right of the assured to the indemnity, and the assurer to the property, even though she be afterwards liberated. *Lee v. Boardman*, *ibid.* 238.

Same point. *Munson v. The New England Ins. Co.* 4 *Mass. Rep.* 88.

When an abandonment is offered to underwriters by the insured, it is not necessary to produce evidence of the loss under oath. *ibid.*

In *Massachusetts*, it has been questioned, but not decided, whether the obligations and rights of the parties to a policy of insurance be determined by the *actual state of the facts*, or of the *intelligence received* at the time of the offer to abandon. *Dorr v. N. E. Mur. Ins. Co.* 4 *Mass. Rep.* 221. Vide *infra*.

The assured knew of the loss on the 24th of *February*, and did not offer to abandon till the 10th of *April* following to the assurers, who lived in the same place; this

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Lord KENYON held that it was incumbent on the plaintiff to prove that fact.

was held an unreasonable time, and the right to abandon was lost. *Smith v. Newburyport Ins. Co. ibid.* 668.

To entitle the assured to recover for a total loss, where the property insured is captured, a previous abandonment is necessary; *aliter*, if the property is burnt, sunk in the ocean, &c. *Townsend v. Phillips*, 2 *Roof's Rep.* 400.

In *New York*, on a capture, restoration, and abandonment, the fact of restoration though unknown at the time of abandonment, takes away the right to abandon and claim for a total loss; and under such circumstances the assured is entitled only to recover according to the final event. *Church v. Bedient*, 1 *N. York Cas. in Er.* 21. *Hallett v. Peyton, ibid.* 28.

But in subsequent cases, it was ruled *otherwise*. *Mumford v. Church*, 1 *Johns. Cas.* 147. *Slocum v. The United Ins. Co. ibid.* 151. *Murray v. The United Ins. Co. 2 Do.* 263. *Livingston v. Hastie*, 3 *Johns. Cas.* 293.

Where the goods saved do not amount to half the value of the goods insured, the insured may abandon. *Gardiner et al. v. Smith*, 1 *Johns. Cas.* 141.

After an abandonment, the consignee of the goods insured becomes the agent of the insurer, and his acts done in good faith, are at the risk and for the benefit of the insurer, *ibid.*

The insured are not bound to abandon in case of an accident, but may wait the final event, and recover accordingly for a partial or total loss, as the case may be. *Earl v. Shaw, ibid.* 313. *S. P. Roget v. Thurston*, 3 *Do.* 248. *Steinbach v. The Columb. Ins. Co. 2 Caines' Rep.* 139. *Smith v. Steinbach*, 2 *N. York Cas. in Er.* 158.

It is sufficient if there be a loss continuing to the time when the abandonment is made. *Earl v. Shaw*, 1 *Johns. Cas.* 313.

Where a ship is abandoned to the insurer, who accepts it, and the voyage being afterwards performed, the freight is earned, the insurer is entitled to the freight earned subsequent to the abandonment, *pro rata*. *The United Ins. Co. v. Lenox, ibid.* 377. Affirmed in Error, 2 *Do.* 443.

The freight prior to the loss, goes to the ship owner, or to his representative, the insurer on freight. *The Marine Ins. Co. v. The U. States Ins. Co. 9 Johns. Rep.* 186.

Information of a vessel's being captured, and also re-captured and carried into a port of the country in the way of her destination, to which she is bound, takes away the right to abandon. *Muir v. The United Ins. Co. 1 Caines' Rep.* 49.

Whether is newspaper information such on which an abandonment may be made? *ibid.*

When a vessel cannot be repaired for her value, she may be abandoned. *Abbott v. Broome*, 1 *Caines. Rep.* 292.

If a vessel be duly abandoned and refused, and after a sale for the benefit of all concerned, under an order of the Court of Admiralty, pronouncing her not worth repairing, she be brought in by the supercargo, a part owner, it is not a waiver of the abandonment, though, on her arrival at her home port, she be sold at auction for more than she cost, and the supercargo, at the time of the action brought, have the proceeds in his hands. *ibid.*

If, after a vessel has been abandoned, she arrive in port, and be there fitted out by the former owners, and sent on another voyage, it is a waiver of the abandonment. *Saidler et al. v. Church, note, ibid.* 297.

Receipt of freight earned by the vessel abandoned, is not a waiver of the abandonment, if the underwriter did not accept it. *Abbott v. Broome, ibid.* 292.

The defendant on the general issue may avail himself of any

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An abandonment may be proved by parol evidence. *Peyton v. Hallett*, *ibid.* 363. In such a case, it is not necessary to give notice to produce the letter of abandonment, to give in evidence the original, of which it is a copy. *ibid.*

Neither an acquittal nor a restitution prejudice an abandonment once duly made. *Bordes v. Hallett*, *ibid.* 445.

In case of a restitution of goods to an owner, at a port into which a vessel is carried, he is not bound to send them on to their port of destination. *ibid.*

After an abandonment and payment of a loss, a purchase of the property insured by the agent of the assured, made after condemnation, is for the benefit of the assurer if he elect, and the proceeds of the cargo, as well as the property in which they are invested, become his property, for which he may maintain trover. *United Ins. Co. v. Robinson* 2 *Caines' Rep.* 230. Affirmed in Error. 1 *Johns. Rep.* 592.

If, after capture, the assured appoint an agent to prosecute his claim, such agent, after abandonment, becomes the assurer's agent, and a receipt by him for the proceeds of the property will be deemed a re-capture by the assurer, who must look to the agent for the amount, and pay the assured his full loss. *Miller et al. v. Depeyster et al.* 2 *Caines' Rep.* 301.

All *bona fide* acts by such agent bind the assurer. *ibid.*

If profits only be insured, an abandonment is necessary where there has been no insurance on the cargo, and only that the insurer may elect to pay his loss, or to pay that and the price of the goods, at first cost and charges: therefore if the assured lie by, and take his goods and sell them, he cannot afterwards call on the assurer for any loss on the profits. *Tbm v. Smith*, 3 *Caines' Rep.* 245.

Whether the above rule would apply between different sets of underwriters, on cargo and profits. *ibid.*

Whether abandonment of a vessel insured has been waived, may be a question of law, or a question of law and fact, according to circumstances; and in the latter case, it is proper matter to be submitted to a jury. *Curcier v. Philadelphia Ins. Co.* 5 *Serg. & R. Rep.* 113.

An insurance was effected on a cargo and freight by an insurance company, and by twenty-three separate insurers on the ship. The ship was captured, and an abandonment was made to the several insurers on ship, cargo, and freight respectively; which was accepted, and the sums insured paid for a total loss. The ship and cargo were afterwards liberated, and the ship proceeded to the port of destination, and there delivered her cargo, which was there sold, and the nett proceeds applied by the master, who was joint consignee with merchants there to defray the expense of repairs, and for arming the ship. In an action brought by the insurers on the cargo against one of the insurers on the ship, as part owner, after the abandonment for the nett proceeds of the cargo, so taken and applied for the repairs of the ship, it was held that the separate insurers were separately answerable, and not as joint partner with the others for his proportion of nett proceeds of the cargo applied to the repairs, but not for the arming. *The United Ins. Co. v. Scott*, 1 *Johns. Rep.* 106.

On an insurance on a cargo at and from New York to a port or ports in Cuba and back, the policy contained the usual clause, that the insurer was not to be liable for the consequence of illicit trade; the vessel arrived at the destined port, but was not allowed to enter; after waiting twenty days, she sailed for another port in the island, but was driven by adverse winds into the Bite of Leogane, and for fear of the brigand boats went into Port Republican, where the cargo was forcibly taken by the government there, and sold at a great loss; the insured abandoned for a total loss, assigning as the cause the refusal of entry, and that the voyage had been thereby de-

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circumstance which makes the policy void, as fraud or misrep-

feated; it was held that the denial of entry at *St. Jago* was not a loss within the policy: as to the effect of a denial to trade, if the voyage had ended there, *dubitat*; the insured, in making the abandonment, must assign the true cause; if he assign an insufficient one he is bound by it, and cannot avail himself of a subsequent event without a new abandonment, and that the assured was entitled to recover only for a *partial* loss, which was to be estimated by deducting the nett proceeds of the sale at *Port Republican*, from the prime cost. *Suydam et al. v. The Marine Ins. Co. ibid.* 181. 2 *Johns. Rep.* 138. Vide *Speyer v. New York Ins. Co.* 3 *Johns. Rep.* 88.

A vessel, in attempting to get out of the harbour, grounded and became leaky; the cargo, consisting chiefly of flour, being damaged, was unladen, and the ship repaired in six days, at the expense of 150 dollars; information was given to the assurers on the freight and cargo, of the accident the day after it occurred, and a formal abandonment was made to them in two days thereafter. The owners of the cargo received it of the owners of the vessel, and sold it at auction at a loss of twenty-seven per cent. It was held the assured had no right to abandon; but ought to have insisted on carrying the cargo to the place of destination, so as to entitle themselves to full freight; and the assistance given by the assurers in saving the property did not amount to an acceptance of abandonment. *Griswold v. The New York Ins. Co.* 1 *Johns. Rep.* 205. *S. C.* 3 *Do.* 321.

When a vessel is turned away from her port of destination, which is in actual blockade, and she goes to another port to deliver the goods, it will be considered as done for the benefit of all concerned, and will not destroy the right of the insured to recover on the abandonment. *Schmidt v. The United Ins. Co. ibid.* 249.

To justify an abandonment in the case of stranding, the goods must be deteriorated to half their value; where it occurs at the mouth of a river, so that the insured might by means of lighters, send the goods to the port of destination, she is bound to do so, and cannot sell them at auction, and abandon for a total loss. *Ludlow v. Columbian Ins. Co. ibid.* 335.

If certain articles be stated in a policy, and a moiety of them be lost, the assured may abandon them as for a total loss, though the loss be not equal to a moiety of the whole cargo. *Vandenhoevel v. The United Ins. Co. ibid.* 406.

After an abandonment, which is not accepted by the insured, the insured remains the *quasi* agent or trustee of the insurer, and must do what he thinks for the interest of the concerned; and if he act with fidelity, and sell the property at auction in the usual manner, without a view to his own benefit, it is no waiver of his abandonment, nor will it prejudice his right. *ibid.* *M. Bride v. The Marine Ins. Co.* 5 *Johns. Rep.* 299.

The captain continues the agent of the assured after capture, until the abandonment is made, and may, as such, prejudice him by his acts. He is the agent of the insurer only when he acts for the benefit of all concerned. *Doederer v. Del. Ins. Co.* *C. C. April, 1807, M. S. Rep.*

An insurance on 300 barrels of flour was effected from *New York* to *London*; during the voyage it became necessary, for the preservation of the ship, to throw over a part of the cargo, among which were 123 barrels of the flour insured, and 30 barrels more were so much damaged that it became necessary to sell them at *Norfolk*, where the ship went from necessity; the value of the flour lost and that sold, after deducting the nett proceeds of the latter, was less than a moiety of the prime cost of the whole 300 barrels; the insured, on hearing of the loss sustained, abandoned as for a total loss, but the ship was afterwards repaired and arrived at *London*, where she delivered the residue of the flour to the consignees: it was held

sensation, want of interest, the ship not being sea-worthy, devi-

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that there being a loss of more than a moiety of the article specifically insured, the insured had a right to abandon and recover for a total loss. *Moses et al. v. The Columb. Ins. Co. 6 Johns. Rep. 219.*

If there be an absolute interdiction of commerce with the port of destination, so that the completion of the voyage is impracticable, or attended with a moral certainty of seizure or loss, or if the port of destination be in the possession of an enemy, or actually blockaded, it seems the assured are not bound to proceed, but may abandon. *Craig et al. v. United Ins. Co. ibid. 226.*

But the assured are not entitled to abandon *quia times*, in cases where the danger is remote or contingent. *ibid.*

An abandonment must be made within a reasonable time, or the insured cannot recover for a total loss. *Fuller v. M^cCall, 2 Dall. Rep. 219. 1 Yeates' Rep. 464. Bell v. Beveridge, 4 Dall. Rep. 273. Camberling v. M^cCall, 2 Dall. Rep. 280. 2 Yeates' Rep. 231. M^cCalmont v. Murgatroyd, 3 Yeates' Rep. 27. Duncan v. Koch, Wall. Rep. 39. Parker v. Towers, 2 Browne's Rep. Ap. 33. Krumphaar v. Marine Ins. Co. 1 Serg. & R. Rep. 281.*

An abandonment is a yielding, ceding, or giving up, by the insurer to the insured, where there has been a great loss, and resorting to the policy for an indemnity, leaving whatever remains for the insured. *Fuller v. M^cCall, 2 Dall. Rep. 219.*

Whether an abandonment be necessary where there has been a total loss of the ship and cargo. *ibid.*

If the vessel be in the hands of the captors at the time of abandonment, such abandonment is good, though she be afterwards released, and restored before the action is commenced. *Dutilh v. Gatliff, 4 Dall. Rep. 446. Vide infra.*

After abandonment, if it turns out to be legal, the insured is to be considered as agent for the insurer, so that he may employ the ship to her best advantage. *Curcier v. The Philadelphia Ins. Co. 5 Serg. & R. Rep. 113.*

A mere arrest or detention of a neutral vessel by a belligerent for the purpose of legal adjudication, will not authorise an abandonment. *Duncan v. Koch, 1 Wall. Rep. 37.*

The insured are not bound to abandon till the loss has *actually* happened, though there is every probability, and almost a certainty to his knowledge, that a loss will happen, nor until he has received certain information of a loss. *ibid.*

What shall amount to information of a loss, must depend on the circumstances of the case. *ibid.*

Is the time within which an abandonment ought to be made, a question of law? *ibid.*

The capture of a neutral as a prize by a belligerent, is a total loss, and entitles the assured to abandon. *Rhineland v. Ins. Co. of Pennsylvania, 1 Hall's Amer. Law Journ. 1. 4 Cranch's Rep. 29.*

The state of the loss at the time of the offer to abandon, and not the state of the information received, fixes the rights of the parties. *ibid. Marshall v. Delaware Ins. Co. ibid. 202. Alexander v. Baltimore Ins. Co. ibid. 370.*

The assured have a right to abandon on capture; and every endeavour to recover ship and cargo afterwards shall be intended for the benefit of the underwriters. *Campbell v. Williamson, 2 Bay's Rep. 237.*

The insured have a right to abandon ship and cargo upon capture, though not obliged to do so immediately after, if there is any probability of recovering the property afterwards: therefore it is not too late for the owners to make their election to abandon finally after a decision, in a Court of Admiralty, on the subject of prize or no prize. *May v. Tunno et al. ibid. 307.*

The claimants getting possession of vessel and cargo, on giving security for the

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ation, non-performance of warranties, &c. Proof of fraud, or

property, if condemned, on an appeal by the captors, is not a restitution, nor conclusively, nor definitive on the parties. *ibid.*

The delay and uncertainty of decisions, are risks within the policy. *ibid.*

Sea-worthiness.

In every insurance on a ship or goods, there is an implied warranty, that the ship is seaworthy. *Porter v. Bussey*, 1 Mass. Rep. 436.

If the ship be not seaworthy, the policy will be void, though the insured were ignorant of the fact. *ibid.*

A vessel must not only be seaworthy at the time of her sailing, but must be also duly equipped and manned with a competent crew for the voyage insured. *Silva v. Low*, 1 Johns. Cas. 184. *Barnwall v. Church*, 1 Caines' Rep. 217. *Talcot v. Marine Ins. Co.* 2 Johns. Rep. 130. *Same v. Commercial Ins. Co.* *ibid.* 124.

It is an implied warranty in every policy, on the vessel or goods, that the vessel is seaworthy, and competent to perform the voyage; and it makes no difference though the vessel were surveyed before she sailed, and pronounced by carpenters to be competent, if she prove on the voyage not to have been seaworthy. *Warren v. The United Ins. Co.* 2 Johns. Cas. 231.

Admiralty surveys of seaworthiness, are *ex parte* evidence, and inadmissible. *Abbott v. Seber*, 3 Johns. Cas. 39. *S. P. Saltus et al. v. Commercial Ins. Co.* 10 Johns. Rep. 487.

A crew of two persons, including the master, is not sufficient for a vessel of thirty-five tons from *New York to Edenton, N. C.* and of this, if it appear in evidence on the case made, the Court will judge. *Dow v. Smith*, 1 Caines' Rep. 32.

Seaworthiness is always implied, and never at the risk of the underwriter. *Barnwall v. Church*, *ibid.* 217. *Abbott v. Broome*, *ibid.* 292.

If the defects in a vessel, existing previous to effecting the policy, be not such as to render the vessel unseaworthy, they are not to be taken into consideration, in determining whether the repairs put on her, exceed half her value. *Depeyster v. Columbian Ins. Co.* 2 Caines' Rep. 85.

If a vessel be seaworthy at the time of her sailing, and suddenly afterwards spring a leak, and founder, without any stress of weather or apparent cause, it is a loss by the perils of the sea, and the insurer will be liable, and whether she be seaworthy or not, the jury will determine as a matter of fact. *Patrick v. Hullatt, et al.* 1 Johns. Rep. 241.

Where a vessel sailed with a fair wind and moderate weather, and in the evening of the same day sprang a leak and foundered, without any apparent cause or extraordinary accident, it was held her loss must be presumed to have arisen from her not being seaworthy at the time of sailing. *Talcot v. The Commercial Ins. Co.* 2 Johns. Rep. 124.

It would appear, that the implied warranty of seaworthiness, does not extend as far as to warrant, that the vessel shall have all proper documents or papers on board. *Elting et al. v. Scott et al.* *ibid.* 157.

On an insurance "at and from," the warranty of seaworthiness must be referred to the commencement of the risk, and if between that time and the sailing of the vessel, she becomes unfit for sea, without the fault of the assured, and is afterwards lost, the assured may recover. *Garrigues v. Cox*, 1 Binn. Rep. 592.

To determine the question of seaworthiness, the nature of the voyage is to be considered. *Bell v. Reel et al.* 4 Binn. Rep. 127.

When a vessel is staunch, and properly fitted for sea, before she sails out of port, the springing leak, or other accident at sea afterwards, will not vitiate the policy. *Miller et al. v. Russell et al.* 1 Bay's Rep. 309.

want of sea-worthiness, lies upon the defendant; but in cases

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Where a vessel proves leaky and unfit for sea, the day after she sails, without any violent gale of wind, to make her so, it is strongly presumptive she was not seaworthy when she sailed. *Wallace v. Depau et al.* 2 Bay's Rep. 503. *Coit et al. v. Del. Ins. Co.* C. C. Oct. 1809, *M. S. Rep.*

Voyages illegal by want of neutrality, &c.

A passport granted by any particular government, to protect against its own cruisers, is not such a sailing under the flag of that government, as to stamp a national character, and be a violation of neutrality. *Hallett et al. v. Jenks et al.* 1 *N. York Cas. in Er.* 43. 1 *Caines' Rep.* 60.

A vessel driven by distress, into a French port, where a part of the cargo is taken by the officers of the government, and she prevented from taking away her original lading, may, (without incurring the penalties of the Act forbidding all intercourse with the dependencies of France,) purchase and load with the produce of the country, *ibid.*

A mere sailing for a port, understood to be blockaded, is not such a breach of neutrality, as to destroy the policy of insurance. *Vos v. The United Ins. Co.* 1 *N. York Cas. in Er.* vii. 2 *Johns. Cas.* 469. Contra in Supreme Court, 2 *Do* 180. Et vide *Listard et al. v. Graves*, 3 *Caines' Rep.* 936.

The trade of a domiciled alien, carried on from the United States, with the enemies of his mother country, is protected under a warranty against illicit trade. *Johnston et al. v. Ludlow*, 1 *N. York Cas. in Er.* xxix. 2 *Johns. Cas.* 481.

To constitute a breach of that warranty, the seizure must be for an actual illicit, prohibited or contraband trade; and a seizure under pretext of such a trade, is not sufficient, if the trade be not in fact one or the other. *ibid.* 1 *N. York Cas. in Er.* xxix.

Where an insurance is made on part of a cargo, warranted free from contraband, and part of the cargo uninsured, was contraband to the knowledge of the insurer, and the vessel being condemned on account of the contraband goods, the plaintiff shall recover for a total loss. *Bowne v. Shaw, Coleman & Caines' Cas. in Prac.* 304. 1 *Caines' Rep.* 439.

In an action on a policy of insurance from New York to the Havanna, on all lawful goods, it was held, that articles contraband of war, were lawful goods within the meaning of the policy; that goods not prohibited by the positive law of the country, to which the vessel belongs are lawful; and that the insured are not bound to disclose to the insurer, that the goods insured are contraband of war. *Seton et al. v. Low*, 1 *Johns. Cas.* 1. *S. P. Skidmore v. Desdoucey*, 2 *Johns. Cas.* 77 *Juhel v. Rhinelanders*, *ibid.* 190. S. C. affirmed in error. *ibid.* 487.

A policy of insurance against the risk from an illicit trade, is valid, though it would be void, if intended to protect a trade prohibited by our laws. *Gardner et al. v. Smith*, 1 *Johns. Cas.* 141.

A neutral, residing as the consul of a neutral state in a belligerent country, and carrying on trade there as a merchant, is to be considered as domiciled in that country, and if he be connected with neutral partners in trade, his property will be subject to capture and condemnation by a belligerent, as enemy's property. *Arnold v. The United Ins. Co.* *ibid.* 363.

A warranty of being the property of an American citizen, is proved by reputation, employment and domicile. *Pryton v. Hallett*, 1 *Caines' Rep.* 363.

Property warranted to be neutral, must not only have every document necessary to prove its neutrality, according to treaties, and the laws of nations; but it must not be accompanied with any papers to compromit its neutral character. *Blagge v. The United Ins. Co.* *ibid.* 549.

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where such a defence is expected, it will, of course, be proper

If, under such a warranty on goods, the outward cargo appear to have produced less than the homeward one cost, the assured in a voyage from a belligerent country, must shew that the excess is derived from neutral funds. *ibid.*

To constitute a blockade, so as to affect a policy of insurance by a violation of it, there must be an actual existing force, before the port, at the time it is entered; the *animus revertendi* of a blockading fleet, does not continue the blockade, nor is the entry of a neutral, after being warned, a breach of his neutrality, if the blockading force be not before the port. *Williams v. Smith, 2 Caines' Rep. 1.*

But an actual removal of a blockading fleet, by winds or storms, does not suspend the blockade, and if the neutral with notice of the cause of its absence, attempt to enter, it is a breach of the blockade. *Radcliff v. The United Ins. Co. 7 Johns. Rep. 38.*

An assignment of part of the subject insured to a belligerent, though after capture, is a breach of a warranty of neutral property. *Gould v. United Ins. Co. 2 Caines' Rep. 73.*

A policy on goods, from *New York to France*, was effected warranted *American* property; the goods were purchased in *New York*, by *American* merchants, and shipped on board of an *American* vessel, consigned to merchants in *France*, under an agreement for that purpose, by which the former were to deliver the goods at *St. Valery*, and be allowed 8 per cent commissions, taking upon themselves *all* risks; the consignees were to pay the freight on delivery, and also for the goods in bills on *London*, guaranteed by a commercial house in *London*; the goods were captured by the *British*, and condemned as *French* property. In an action on the policy, it was held, the goods remained the property of the consignees, until their delivery in *France*, and that the warranty in the policy was complied with; that such a contract was legal and valid, and did not change the property, so as to destroy its neutral character, or violate the contract of insurance. *Ludlow v. Browne et al. 1 Johns. Rep. 1.*

A vague rumour or knowledge of an embargo, received from a pilot, before vessel sailed, is not sufficient to charge the assured with knowing the Act laying the *American* embargo of the 22d Dec. 1807, so as to render the voyage illegal in its commencement. *Walden et al. v. Phoenix Ins. Co. 5 Johns. Rep. 310.*

Actual or constructive notice of the existence of a blockade, is requisite, before a neutral can be deemed *in delicto*, or to have violated his neutral duty, by attempting to enter the port. *Radcliff et al. v. The United Ins. Co. 7 Johns. Rep. 38.*

A purchase of a vessel by an alien, to be paid for at all events, but to be transferred at a future day; the property remains in the seller, an *American* citizen, and is a compliance with a warranty of *American* property. *Murgatroyd v. Crawford, 3 Dall. Rep. 491.*

If the general agent of the assured, where the property insured is warranted neutral, deceive one of the belligerents, by covering the property of his enemy, the assurer is discharged. *Pratt v. The Phoenix Ins. Co. 1 Browne's Rep. 152. S. C. 2 Binn. Rep. 308.*

Persisting in an intention to enter a blockaded port after warning, is not attempting to enter. *Fitzsimmons v. Newport Ins. Co. 1 Hall's American Law Journal, 139. 4 Cranch's Rep. 185.*

A breach of a blockade, under the treaty with *Great Britain*, must consist of a second attempt to enter a blockaded port, after being warned off by the blockading squadron; loose declarations of a master, when not in the possession of his ship, that if released, he intended to enter the blockaded port, do not amount to such an attempt. *Williamson et al. v. Tunno et al. 2 Bay's Rep. 338.*

for the plaintiff to be prepared with evidence to support that part of his case.

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Wager policies, &c.

In *Massachusetts*, a wager policy was held not to be a valid contract. *Amory v. Gilman*, 2 *Mass. Rep.* 1. *Dumas v. Jones*, 4 *Do.* 647.

A wager policy is valid at common law. *Juhel v. Church*, 2 *Johns. Cas.* 333. *Abbott v. Sebor*, 3 *Do.* 39. *Clendenning v. Church*, 3 *Caines' Rep.* 141.

The main principles of the *British Statute 19 Geo. 2, c. 37*, have been adopted in *Pennsylvania*, both by the Courts of Justice, and commercial usage. *Pritchett v. Ins. Co. North America*, 3 *Yeates' Rep.* 458. *Craig et al. v. Murgatroyd*, 4 *Do.* 168.

A part owner of a vessel, who has chartered the rest, with a covenant to pay the value, in case of a loss, may insure the whole vessel as his property, *Oliver v. Greene*, 3 *Mass. Rep.* 183. *Vide Dumas v. Jones*, 4 *Do.* 647.

Where the insurer of a house, after he has effected an insurance, sells the same, still reserving a certain interest, he will be able to recover on the policy in case of a loss. *Stetson v. Mass. Mutual Fire Ins. Co.* 4 *Mass. Rep.* 330.

An owner of a ship bottomed for more than her value, has not an insurable interest in her. *Smith v. Williams*, 2 *N. York Cas. in Er.* 110. 2 *Caines' Rep.* 1.

Neither a want of averring interest, nor the words of the policy being "policy to be proof of interest," are of themselves evidence of a wager policy. *Clendenning v. Church*, 3 *Caines' Rep.* 141.

On a wager policy, to entitle the assured to recover, the loss must be absolutely total, a technical total loss, gives no right. *ibid.*

Profits are insurable *eo nomine*. *Tom v. Smith*, *ibid.* 245. *Abbott v. Sebor*, 3 *Johns. Cas.* 39.

The insured purchased a *British* ship of merchants in *Jamaica*, but not being able to pay the whole purchase money, it was agreed, that the ship should continue in the names of the original owners, until the balance was paid; the insured took possession, and acted as owner of the vessel; in an action on a policy of insurance on the vessel, effected in the name of the insured, it was held he had an insurable interest. *Kenny v. Clarkson*, 1 *Johns. Rep.* 385.

The owner of a vessel, notwithstanding there may be a bottomry bond on the vessel, may insure his interest in her. *ibid.*

A lien or contingent interest in a cargo, is a subject matter of insurance, and on abandonment, the assurer acquires all the rights and privileges of the assured. *Russel v. The Union Ins. Co.* 4 *Dall. Rep.* 421.

What lien on goods is an insurable interest? *Donath v. The Ins. Co. of North America*, *ibid.* 463.

If such goods themselves be insured by the person claiming the lien as agent for the owner of the goods, he cannot recover on a capture and restitution of goods to the owner, who does not satisfy the lien. *ibid.*

Re-assurance and double assurance.

In *Massachusetts*, a policy of re-assurance is a valid contract. *Merry v. Prince*, 2 *Mass. Rep.* 176.

On a re-assurance no abandonment is necessary, though the primitive insurer has abandoned to his insurer. *Hastie v. Depeyster*, 3 *Caines' Rep.* 190.

The re-assurer is liable to the assurer, for all costs, &c. *bona fide* incurred in defending the suit of the original insurers, especially when he is present, and does not offer to settle *ibid.*

It is necessary for the original underwriter, to shew he has been obliged to

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pay a just claim against him, and he will be entitled to interest on all he has paid. *ibid.*

In the case of a double assurance, the insurers shall contribute rateably, to satisfy a loss. *Thurston v. Koch*, 4 *Dall. Rep.* 348. *Appendix XXXII.*

To constitute a double insurance, it seems that the two insurances must not only be for the benefit of the same person, and on the same subject, but for the same risk. *Col. Ins. Co. v. Lynch*, 11 *Johns. Rep.* 233. *Et vide Thurston v. Koch*, 4 *Dall. Rep.* 350. *Warder v. Horton et al.* 4 *Binn. Rep.* 529. *Et vide Peters v. Delaware Ins. Co.* 5 *Serg. & R. Rep.* 473.

Deviation.

Nothing will justify a deviation from the voyage described in the policy, but a real and imperious necessity. *Stocker et al. v. Harris*, 3 *Mass. Rep.* 409.

A ship, cargo, and freight are insured, from *Boston* to the *Canaries*, at and from thence to any port or ports in *Spanish America*; at and from thence to her port of discharge in the *United States*, under whatever papers she may sail. She arrives with *Spanish* colours and papers, in due course at *Vera Cruz*, where she lands her cargo, which is seized by the government as an illegal importation. The master remains five months with the ship, prosecuting the recovery of the cargo. Failing in this, he takes a cargo on freight to the *Havanna*, and on his voyage was captured, and afterwards condemned. The stay at *Vera Cruz* was not, and the voyage to the *Havanna* was held to be, a deviation. *ibid.*

Where a captain acts from the best of his judgment for the benefit of all concerned, and displays ordinary skill and judgment, the contract of insurance remains unimpaired by a deviation under such circumstances. *Brazier et al. v. Clap*, 5 *Mass. Rep.* 1.

A mere intention to deviate, without an actual deviation, will not release the underwriters. *Lee et al. v. Gray*, 7 *Mass. Rep.* 349. *Snowden et al. v. Phoenix Ins. Co.* 3 *Binn. Rep.* 467.

Where a vessel staid in port six months after the date of the policy, it was held not to be a deviation, the delay not being fraudulent or varying the risk. *Earl v. Shaw*, 1 *Johns. Cas.* 313.

Whether the negligence of the assured in not having proper documents on board, or having contradictory papers, in consequence of which the ship is taken out of her course, amount to a deviation? *Goix v. Low*, *ibid.* 341.

Where the termini of the voyage insured are preserved, it is only a deviation to touch at any intermediate port; and though it be resolved on before the voyage commenced, yet it is not a different voyage from that described in the policy, and the insurer will be liable for any loss before arriving at the dividing point. *Henshaw v. Mar. Ins. Co.* 2 *Caines' Rep.* 274. *Silva v. Low*, 1 *Johns. Cas.* 184.

If the assured be apprised by his master of his pursuing another voyage than that insured, on which he has been sent, and do not disapprove of it, it is only a deviation and not *barratry*, though the master ultimately ran away with the ship, sell her, and embezzle the proceeds. *Thurston v. The Col. Ins. Co.* 3 *Caines' Rep.* 89.

An insurance on a cargo of corn and flour from *New York* to *Madeira*, with the usual memorandum in the policy. In her passage the vessel met with bad weather, and arriving in sight of *Madeira*, she was prevented by adverse winds from entering the port, and suspecting a ship in sight to be a privateer, the master bore away and went to the *Cape de Verd Islands*, where the cargo, being much damaged, was ordered by the government to be sold there, not being able to repair the vessel, the insured broke up the voyage, and abandoned for a total loss; but the vessel got some repairs and went to *Lisbon*. The going to the *Cape de Verd Islands* was held

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not to be warranted by necessity, and therefore a deviation. *Nelson v. Columbian Insur. Co.* 1 Johns. Rep. 301.

An alteration of the voyage, after the risk has commenced, is only a deviation. *Lawrence v. Ocean Ins. Co.* 11 Johns. Rep. 241.

A clearance to a port different from the one insured, with a view to avoid detention by cruisers, does not make a different voyage, and though the master state in his protest that he sailed for a different port, yet if he explain his reason for so doing it will not vary the case. *Talcot v. The Mar. Ins. Co.* 2 Johns. Rep. 130.

A vessel and her cargo were insured "from New York to Antigua, and "at and from Antigua to Curacao." The vessel, after her departure from New York, was forced by necessity into St. Croix, where part of the cargo, being perishable and damaged, was sold before the necessary repairs were completed; and the master deeming it impracticable to bear up to Antigua, sailed direct from St. Croix to Curacao, and while proceeding thither, he was captured by a British cruiser, sent to Jamaica, and condemned for attempting to enter a blockaded port. In an action on the policy, it was held that going direct from St. Croix to Curacao, without proceeding first to Antigua, was no deviation, and that a sale of a part of the cargo at St. Croix, did not avoid the policy. *Kane v. The Col. Ins. Co.* *ibid.* 264.

Where a vessel, insured from New York to Bordeaux, had French passengers on board, and the owners instructed the master to go to sea through the Sound to avoid detention by British cruisers then off the Hook, and the master did so instead of the Narrows, which is the most usual and least dangerous route to the sea, it was held not to be a deviation. *Reade v. The Commercial Ins. Co.* 3 Johns. Rep. 352.

Where the master altered the course of the voyage with the intention to benefit as well his owners as himself, it is only a deviation, and the insurers are discharged. *Hood's exrs. v. Nesbit et al* 9 Dall. Rep. 137. S. C. 1 Yeates' Rep. 144.

If a vessel stay at a port after her liberation longer than is necessary to prepare for the voyage and the purpose of trading, it is a deviation. *Kingston v. Girard*, 4 Dall. Rep. 274.

It is no deviation to touch and stay at a port out of the direct course of the voyage, if such departure be within the usage of the trade, and whether the deviation in point of time or object of cause be within the established usage is a matter of fact. *Benteloe v. Pratt*, 1 Wall. Rep. 61.

A detention at sea to save a vessel in distress is such a deviation as discharges the underwriters. *Mason v. The Blareau*, 3 Cranch's Rep. 268.

If a vessel be insured at and from K. to A. and take a cargo for B. and A. and sails with intent to go first to B. and then to A. and is captured before she arrives at the dividing point between A. and B. it is only a case of an intended deviation and not of non inception of the voyage. *Mar. Ins. Co. v. Tucker*, 3 Cranch's Rep. 357.

A policy will not be vacated by a deviation on a voyage occasioned by stress of weather, unavoidable accident, to avoid an enemy or the like. *Miller et al. v. Russell et al.* 1 Bay's Rep. 309.

Where a vessel has the privilege of stopping at a port and does not, it is no deviation. *Cross v. Shuliffe*, 3 Bay's Rep. 220.

A ship parted from her convoy by stress of weather, compelled to bear away for another port, and taken while out of her course to the destined port, and condemned, will not exonerate the insurer. *Campbell v. Williamson*, *ibid.* 237.

Representations.

Where a house insured is represented at the time of effecting the insurance to be connected with another building on one side only, and before the loss happened it

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of full instructions on this subject, in the books of Mr. Justice

became connected on *two sides*, the policy is not avoided, unless the risk became greater. *Stetson v. The Mass. Mutual Fire Ins. Co.* 4 *Mass. Rep.* 330.

If a belligerent emigrate to a neutral country *flagrante bello*, and be there naturalised, a warranty of neutrality is thereby supported; nor need the assured disclose the period of his naturalisation. *Duguet v. Rhinelander*, 1 *N. York Cas. in Er.* xxv. 1 *Johns. Cas.* 360. 2 *Johns. Cas.* 476. See vide *Jackson v. The N. York Ins. Co. ibid.* 191.

If a vessel be stated as out *about nine weeks*, when in fact she had been out *ten weeks and four days*, it is not a material misrepresentation if that period be within the usual time of the voyage, and whether it be so or not, the jury shall determine. *Mackay v. Rhinelander et al.* 1 *Johns. Cas.* 408. Et vide *Williams v. Delafield*, 2 *Caines' Rep.* 329.

A transfer of a neutral vessel to a subject of the belligerent, to secure a debt, destroys her neutrality; and not being communicated to the insurer destroys the policy. *Murray v. The United Ins. Co.* 2 *Johns. Cas.* 168.

It is not necessary to disclose how long a vessel has lain in a port antecedent to a policy being entered into. *Kemble v. Brown*, 1 *Caines' Rep.* 75.

If the assured have information of a violent storm, the day after his vessel has sailed, and he state only that there has been blowing weather on the coast, it is a misrepresentation which will avoid the policy. *Ely v. Hallett*, 2 *Caines' Rep.* 57.

A representation in time of peace, that a vessel shall sail in ballast, is substantially complied with, though she sail with a trunk of merchandise, and ten barrels of gunpowder, laden on board without the knowledge of the owner. *Suckley v. Delafield*, *ibid.* 222.

If an assured, having written several letters ordering insurance, and sent them by different conveyances, arrive, after a knowledge of a loss, with one of the letters, at a port from whence it is forwarded by the post, he is bound to countermand the order by the same mail. *Watson v. Delafield*, *ibid.* 324. 1 *Johns. Rep.* 150. 2 *Johns. Rep.* 526. S. C. affirmed in error. 2 *Johns. Rep.* 536.

The arrival of another vessel at a port insured *to*, from a port insured *from*, though she may have sailed subsequent to the vessel insured, affords no ground for presuming the assured had any knowledge of the bad weather the arriving vessel had sustained, nor that the assured received information of the sailing of his vessel by the one which arrived, when circumstances show it might have been received another way. *Williams v. Delafield*, 2 *Caines' Rep.* 329.

A representation saying, "I am informed of the vessel's sailing, and she is out this day twenty-six days," is not an assertion as a fact, that she is out so long, and therefore not a misrepresentation, though she may have been out twenty-seven days. *ibid.*

If a vessel be insured as out of time, and she be out *one more* day than the information received specifies, if the jury do not find it to be material, the Court will not say it is so. *ibid.*

If information of the loss of a vessel be known in a place early in the morning of the day on which a policy is effected at noon, it is not proof of fraud to the assured, though it be brought by some of the crew of the ship insured, if it do not appear that they had been on shore. *Livingston v. Delafield*, 3 *Caines' Rep.* 49, S. C. 1 *Johns. Rep.* 522.

If written orders for insurance be laid before the underwriters by the broker, who at the same time communicates to them verbally what is said to have been contained in the written order, the broker may give evidence of his oral declarations, though the order be not produced. *Livingston v. Delafield*, *ibid.*

Where a vessel actually sailed on the voyage insured, concealment of the instruc-

PARK and Mr. Serjeant MARSHALL, it is quite unnecessary to notice in this place the various cases which may arise.

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tions given to the master as to the mode of prosecuting the voyage, is not material. *Talcot v. The Mar. Ins. Co. 2 Johns. Rep. 130.*

A representation to one underwriter is not evidence of a representation to subsequent underwriters on a different policy on the same vessel, and against the same risks. *Elting et al. v. Scott et al. ibid. 157.*

General intelligence, contained in a public gazette, bearing upon the subject-matter of insurance, must be disclosed to the insurers, though they be subscribers to the gazette. *Dickenson v. The Commer. Ins. Co. Auth. N. P. Cas. 67.*

The insured are not bound to disclose the nature of the cargo; it is the duty of the insurer to inquire. *Duplanty v. The Commercial Ins. Co. ibid. 83.*

Where the papers were placed in the hands of the insurer, stating certain facts, and he did not read them, it is his own neglect, and a policy shall not be vacated therefor. *Vasse v. Ball, 2 Dall. Rep. 270. S. C. 2 Yeates' Rep. 178.*

The jury will determine whether there were any concealment of material facts. *Murgatroyd v. Crawford, 3 Dall. Rep. 491. S. C. 2 Yeates' Rep. 430.*

If the insurance on a special interest, (such as a lien,) and not of a principal ownership, made a material difference in the risk, and the facts were not sufficiently disclosed, the policy is void. *Russel v. The Ins. Co. 4 Dall. Rep. 421.*

Return of premium.

In an action for a return of premium, it is competent for the insured to shew the ship not to have been seaworthy, because the contract would be thereby rendered void. *Porter v. Busscy, 1 Mass. Rep. 437.*

If an insurance be effected against the perils arising from a blockade, supposed to exist in a foreign port, and in fact no blockade existed at the time, or while the ship remained at such foreign port, the insurance is void, and the premium shall be returned. *Taylor v. Sumner, 4 Mass. Rep. 56.*

If a policy become void by a failure of warranty, the insured is entitled to a return of premium, if there be no fraud. *Delavigne v. The United Ins. Co. 1 Johns. Cas. 310. Murray et al. v. The United Ins. Co. 2 Do. 168.*

Where the policy never attaches, as if the vessel never sails on the voyage insured, or if it becomes void by a failure of the warranty, there being no actual fraud, the insured is entitled to a return of the premium. *Delavigne v. United Ins. Co. 1 Johns. Cas. 310. Duguet v. Rhineland, ibid. 360. Murray v. United Ins. Co. 2 Do. 168. Jackson v. New York Ins. Co. ibid. 191. Robertson et al. v. United Ins. Co. ibid. 250. Forbes v. Church, 3 Do. 159. Graves v. Marine Ins. Co. 2 Caines' Rep. 339. Murray v. Col. Ins. Co. 4 Johns. Rep. 443. Richards v. Marine Ins. Co. 307. Elberts v. Krafts, 16 Johns. Rep. 128.*

Vide *Juhel et al. v. Church, 2 Johns. Cas. 333*, as to a valued policy.

An action for a return of premium must be brought against the underwriters, and not against the broker. *Bowne v. Shaw, 1 Caines' Rep. 489.*

An action for a return of premium will not lie on account of short interest, if the plaintiff's interest to the extent insured was covered at any time during the voyage. *Howland v. The Commercial Ins. Co. Auth. N. P. Cas. 14.*

If the risk contemplated in a policy do not commence, there is no contract, and the premium must be returned. *Scriba v. The N. Amer. Ins. Co. 1 Hull's Amer. Law Journ. 36. C. C. Oct. 1807, M. S. Rep.*

Average.

If the owner of a vessel which is wrecked have abandoned to the underwriters, and are afterwards compelled to pay the wages of seamen, the underwriters are

Of the evidence in actions between the vendors and vendees of lands or goods.

THE evidence in an action founded on an executory contract for the purchase of lands or goods, as far as it is affected by the

bound to reimburse the owners, if sufficient for that purpose were saved from the wreck. *Frothingham et al. v. Prince*, 3 *Mass. Rep.* 563.

When, in the course of a voyage, a ship insured, being damaged by winds and storms, voluntarily seeks a port to refit, the expenses consequent thereon, including the provisions and wages of the seamen during the detention, are a subject of general average; but the repairs are a distinct charge upon the ship. *Padelford et al. v. Boardman*, 4 *Mass. Rep.* 548.

It has been ruled in *Connecticut*, where live stock on deck was thrown overboard to save the vessel and cargo, it is entitled to a general average. *Brown v. Cornwell*, 1 *Root's Rep.* 60.

In *New York*, it has been decided, that for goods shipped on deck there is no contribution, nor is the owner of the vessel liable as a carrier. *Smith v. Wright*, 1 *Caines' Rep.* 43.

All damages arising immediately from a jettison are to be contributed for, though they happen to perishable articles, which are enumerated in the memorandum, and remain in specie. *Maggrath v. Church*, *ibid.* 196.

Freight and the vessel are to be estimated in a general average at the place where the one is paid and the other is at the time of settling. *ibid.*

Wages and provisions, during the detention of a vessel captured and carried in for adjudication, are subjects of general average. *Leavenworth v. Delafield*, *ibid.* 573. See vide *M^r Bride v. Marine Ins. Co.* 7 *Johns. Rep.* 431.

If a vessel be captured during her voyage, in settling the proportion of average, the freight will be chargeable up to the day of capture. *ibid.*

The amount on which the average, in cases of capture, is to be calculated, is the cargo on its first cost or invoice price, and the charges at the port of departure; the vessel, or four-fifths of its value, at the same place, and the freight at one-half agreed to be paid. *ibid.*

If a vessel be obliged, from sea damage, to bear away to a port of necessity in order to refit; the wages and provisions, from the moment of bearing away to the period of her sailing on her original voyage, constitute a subject of general average, the proportion of which may be recovered in an action of *assumpsit* by the owners of the ship against the proprietors of the cargo. *Walden v. Le Roy*, 2 *Caines' Rep.* 263. *Henshaw v. Marine Ins. Co.* *ibid.* 274.

The charterer of a ship at so much per month, cannot, on an insurance on his cargo, recover the *extra* sum paid during an embargo, such expenditure being the subject of a general average, and not covered by any words of the policy. *Penny et al. v. New York Ins. Co.* 3 *Caines' Rep.* 155.

Where a vessel insured becomes so much injured by the perils of the sea as to make it requisite to sell her in a foreign port, the amount of the value on which a general average is to be calculated, is the amount she actually and *bona fide* sold for, and not the four-fifths of her original value as in cases of capture. *Bell et al. v. The Columbian Ins. Co.* 2 *Johns. Rep.* 98.

The insured of the *ship* may recover a proportion of the expenses incurred, in attempting the recovery of the ship and cargo, of the insurers or owners of the cargo and freight. *Watson v. The Marine Ins. Co.* 7 *Johns. Rep.* 57.

Statute of Frauds, has been noticed in a former page; but it will not be improper to say something further as to the other

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The extraordinary expenses for seaman's wages, &c. during a detention of the vessel during an embargo, cannot be recovered as a partial loss from the underwriters on the freight; they are a general average. *Ins. Co. of North America, v. Jones et al.* in the High Court of Errors and Appeals, 2 *Binn. Rep.* 547, reversing the decision of the Supreme Court reported in 4 *Dall. Rep.* 246. *Kingston v. Girard, ibid.* 274.

Vide *Ferguson v. Fitt*, 1 *Hayw. Rep.* 239, as to Average.

Salvage.

Salvage will be allowed to a *U. States* ship of war, for the re-capture of a *Hamburgh* vessel, out of the hands of the *French* (*France* and *Hamburgh* being neutral to each other) on the ground that she is in danger of condemnation, under the *French* decree of the 18th *January*, 1798. *Talbot v. Seeman*, 1 *Cranch's Rep.* 1.

To support a demand for salvage, the re-capture must be lawful, and a meritorious service must be rendered. *ibid.*

Where the amount of salvage is not regulated by positive law, it must be determined by the principles of general law. *ibid.*

In this case one-third of the gross value of the ship and cargo allowed for salvage, and one-third of the salvage allowed to the owner of the saving ship and cargo. *Mason et al. v. The Blaireau*, 2 *Cranch's Rep.* 240.

If one of the salvors embezzle part of the goods saved, he forfeits his right to salvage. *ibid.*

If a vessel in distress be abandoned at sea, by the master and crew, except one man, who by accident or design is left, he is discharged from his contract as a mariner, and is entitled to salvage. *ibid.*

The share of salvage due apprentices, shall not be paid to their masters, but to themselves. *ibid.*

Insurance on freight.

Underwriters on freight, are not liable for a detention of the ship on the voyage, if she finally earn her freight. *Mayo v. The Maine, &c. Ins. Co.* 4 *Mass. Rep.* 374.

By a valued policy on freight "at and from" one port to another, and "at and from thence," back to the original port, for which a premium is paid, double to that which would be demanded on the outward voyage, the freight to the full amount of the valuation is covered on each voyage, and the insured in case of capture on the return voyage, is entitled to recover the full amount, without any deduction for the freight received on the outward risk. *Davy v. Hallett*, 3 *Cuiner's Rep.* 16.

On a valued policy for freight, if there be an inchoate right to some, and the transaction be *bona fide*, the value cannot be inquired into. *ibid.*

If a ship owner insure his vessel and freight with two sets of underwriters, and on capture abandon first to those on the vessel, and then to those on the freight, after which he receives 50 per cent. of his claim on the underwriters of the vessel and in payment of the other 50 per cent. takes an assignment of their rights on the vessel, he will be entitled to receive the freight to which they would have been entitled, and to recover in his own right from the assurers of the freight the full amount of his policy, deducting the *pro rata* freight earned, previous to the abandonment, in the voyage on which captured. *ibid.*

Under a policy on freight, the gross amount is on a total loss, the sum to be recovered. *Stedens v. The Col. Ins. Co. ibid.* 43.

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evidence necessary to sustain an action on such a contract. The contract being established, the plaintiff must shew that he has

Insurance on *freight*; the vessel being obliged to put into a port, of necessity, the cargo on being taken out, in order to repair the vessel, was found to be greatly deteriorated, and not fit to be re-shipped, and was accordingly sold; the vessel was repaired, so as to be able to prosecute the voyage: the insured cannot recover for a loss of the freight, as the subject, although damaged, still remained *in specie*. *Salvus et al. v. The Ocean Ins. Co.* 14 Johns. Rep. 138.

A vessel was chartered on a voyage from *New York to Jeremie*, and back to *New York* for 2,400 dollars, the charterer insured the "freight valued at 1,700 dollars, being three-fourths of the value of the freight," "on a voyage from *Jamaica* to *New York* upon the freight of goods laden or to be laden," &c. The vessel having been captured on her return voyage and condemned, the charterer brought an action on the policy, and it was held, he had not an insurable interest; that the policy having described the freight generally, it could not be considered as freight earned. *Cheriot v. Barker*, 2 Johns. Rep. 346.

A vessel and freight were insured by the same underwriters, by two different open policies of insurance, on a voyage from *New York* to the river *La Plata*, and at and from thence to a port in *Europe*. The ship arrived at *Buenos Ayres* on 13th February, 1802, under a charter party for freight, and delivered her cargo there, but was detained by an embargo there, until 1st October, 1802, when she sailed for *Havre de Grace*, in *France*; where she arrived in December, 1802; an abandonment of ship and freight was made on 29th June, 1802, but was not accepted; in an action on the policy on freight, the insured was held entitled to recover as for a total loss. *Livingston v. Col. Ins. Co.* 3 Johns. Rep. 49.

Freight is a distinct subject of insurance, and a previous abandonment of the ship to one insurer will not prevent the insured from recovering the freight insured by another, *ibid*.

Whether the abandonment of the ship deprives the owner of freight of his salvage. *ibid*

Whether the insurer of the ship is to account to the insurer of the freight, for the freight earned subsequent to the abandonment. *ibid*.

The underwriters on freight are not liable for the extra expenses of seamen's wages and provisions during an embargo, but they are a subject of general average. *Jones v. The Ins. Co. of N. America*, 2 Binn. Rep. 547. 4 Dall. Rep. 246. *Dubitatur*, *Kingston v. Girard*, *ibid*. 274.

A cargo was carried to a foreign port upon contract, and there tendered to the consignee; but the government refusing permission to land it, it was brought back, the freight was held to be earned, and the assured in a policy on freight was not entitled to recover for a total or partial loss. *Morgan v. The Ins. Co. of N. America*, *ibid*. 455.

Freight paid in advance, is an insurable interest, and liable to an average loss; and the assured in a policy on freight advanced may recover an average loss arising from the payment of salvage. *Sanwom v. Ball*, *ibid*. 459.

Insurance from fire.

In an action on a policy of insurance made against *fire*, on merchandises and utensils, among which were 380 kegs of manufactured tobacco, stated on the back of the policy, "as worth 9,600 dollars," 157 kegs of which were destroyed by fire; it was held that the insured was entitled to recover according to the valuation of the whole number of kegs, and not the costs of the tobacco at the manufactory, or prime cost. Where there is an absolute loss of any article distinctly valued in the policy, the loss is to be estimated according to the valuation, it being in the nature of li-

done every thing in his power to carry it into execution. He must, in cases where he was the seller of lands, prove that he

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quitted damages. *Harris v. The Eagle Fire Ins. Co. of New York*, 5 Johns. Rep. 368.

Bottomry, &c.

Money was lent on bottomry, the bond to be void if lost through the perils of the sea, or by fire, or by enemies; the vessel was captured, condemned as lawful prize, and upon appeal the condemnation was reversed and full compensation made to the owner; it was held the obligee could not recover in an action of debt brought on the bond. *Appleton v. Crowninshield*, 3 Mass. Rep. 443.

An insurance on a vessel will not cover a bottomry interest unless it be expressly mentioned in the policy. *Robertson v. The United Ins. Co.* 2 Johns. Cas. 250. *Kenny v. Clarkson*, 1 Johns. Rep. 385.

A clause of sale in a bottomry bond does not destroy its character or operation. 1 Johns. Cas. 250.

An insurance by the holder of a bottomry bond must be made *eo nomine*. *Kenny v. Clarkson*, 1 Johns. Rep. 385.

An agreement by a lender on *Respondentia* "to be liable to average in the same manner as underwriters on a policy of insurance according to the usages and practices of the city of Philadelphia," does not entitle the borrower to calculate an average loss upon the whole amount of the money loaned and the marine interest, but merely on the cost and charges of the goods on board and the premium of insurance. *Gibson v. The Phil. Ins. Co.* 1 Binn. Rep. 405.

Action on policy of Insurance.

If a policy of insurance be effected in the name of *A.* as agent for *B.* this latter cannot maintain an action on the policy to recover a loss for the use of *C.* whom he declares alone interested in the property insured. *Russel v. The New England Ins. Co.* 4 Mass. Rep. 82.

Several underwriters on the same policy may join in a bill in Chancery against the insured. *Bulkeley v. Starr*, 2 Day's Rep. 553.

Evidence to prove the interest in the cargo was admitted by knowing the articles bought by the plaintiff and seeing them go on board; interest in the vessel was admitted to be proved by the person who saw the original register in the name of the owner when she was about to sail on the voyage insured. *Peyton v. Hallett*, 1 Caines' Rep. 363.

In judging whether a vessel be lost or not, the usual, and not the utmost, length of such voyage, is the period on which the jury will proceed. *Brown v. Neilson*, *ibid.* 535.

If two storms be given in evidence on a policy for time, the one within, the other without, the period, it is for the jury to say in which the loss happened. *ibid.*

An insurance on freight and cargo, after a knowledge of a storm, does not exclude the jury from finding the vessel lost in a previous storm. *ibid.*

Whether a vessel which moves down a river on the voyage insured has actually sailed on it, is a fact depending on circumstances, and the *quo animo* of which the jury will judge. *Dennis v. Ludlow*, 2 Caines' Rep. 111.

The jury have discretion to allow or not interest on the amount of a partial loss on a policy. *Anonymous*, 1 Johns. Rep. 312.

Whether an abandonment was accepted or not, is a question of fact for a jury to decide. *Bell v. The Col Ins. Co.* 2 Johns. Rep. 98.

An insurance on a vessel was made with a clause "that the loss was to be paid

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(1) *Thompson v. Miles*,
1 Esp. 184.

(2) *Goodison v. Nunn*, 4 T.
Rep. 761.

has delivered an abstract of his title to the defendant, and have the title deeds ready to produce, but he will not be called on to prove them.(1) He must then prove either that he has prepared and tendered a conveyance properly executed, to the defendant, and offered to deliver it to him, on payment of the purchase money; or else that he has tendered a draft of a conveyance, and that the defendant has absolutely refused to go on with his contract, and discharged the plaintiff from proceeding in it.(2)(x)

in thirty days after proof thereof;" the day after sailing she sprang a leak and foundered. In an action on the policy, it was held that the exhibiting the protest of the master stating the loss was a sufficient compliance with the clause in the policy as to preliminary proof, and that preliminary proof of interest was not necessary. *Talcot v. The Marine Ins. Co. ibid.* 130.

An insurer, who has paid a loss on a policy, cannot recover back the money unless he made out a clear mistake as to the law or fact. *Elting et al. v. Scott et al. ibid.* 157.

Whether an insurer, who has paid a loss on a policy, can recover back the money unless he make out a clear mistake as to the law or the fact. *ibid.*

Where a vessel was insured and the policy contained a clause "that if the vessel on a regular survey should be declared unseaworthy by reason of her being unsound, or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, the insurers should not be bound to pay," &c. during the voyage the vessel was surveyed and condemned as not worth the repairs, and the insured offered to abandon; the survey was held a necessary part of the preliminary proof to be exhibited to the insurers, and ought to have been produced to them with the other documents, before the commencement of the suit, or some account given why it was not produced. *Hoff v. The Marine Ins. Co. 4 Johns. Rep.* 132.

The insurer may recover above the sum insured for the expense of labour and travel for the defence and recovery of property insured. *Watson v. The Mar. Ins. Co. 7 Johns. Rep.* 57.

And where expenses are incurred for the recovery of the ship, the insured may recover the whole amount against the insurer on the ship, though the freight and cargo be incidentally benefited, and ought to contribute in proportion; leaving the insurer of the ship to recover the same of the owners or insurers of the freight and cargo. *ibid.*

A survey, though a useful and proper document to many purposes, is not an essential piece of evidence to make out the title of the insured to his indemnity. *Bensaloe v. Pratt*, 1 *Wall's Rep.* 61.

Whether the usage and established custom of a port requiring a survey, would control or modify a general law. *ibid.*

The jury may find damages for a partial loss, though the declaration claimed a total loss. *Watson et al. v. The Ins. Co. of North America*, 4 *Dall. Rep.* 233.

TILGHMAN C. J. in the case of *Brown v. The Phoenix Ins. Co. 4 Binn. Rep.* 464, says, "I do not consider the law as settled by this decision. The Court was not unanimous. There certainly are some weighty objections to the principle adopted by the Court in this case."

Assumpsit will not lie on a policy of insurance under the corporate seal, unless a new consideration be averred. *Insurance Co. of Alexandria v. Young*, 1 *Cranck's Rep.* 332.—AM. EO.

(x) In *Massachusetts* it has been ruled that where, in contracts for lands, one overreaches another, by false allegations, or fraudulent concealments, the law will

In the case of goods which are themselves the subject of delivery, and where by the terms of the contract they were to be delivered by the plaintiff, it must be proved that they were taken to the place of delivery at the appointed time, or else that the

compel him to pay over the money obtained by such means, to the party to whom in equity and good conscience it belongs. *Bliss v. Thompson*, 4 Mass. Rep. 488.

An obligation given for compounding a felony, cannot be enforced by the party to whom it is given. *The Inhabitants of Worcester v. Eaton*, 11 Do. 368. *Swett et al. v. Poor et al. ibid.* 549.

In *Vermont*, in an action on a note given for the price of lands, the defendant may, under the plea of *non assumpsit*, give evidence of fraud on the part of the plaintiff to avoid the note. *Hawley v. Beeman*, 2 Tyl. Rep. 238.

So an action for fraud in the sale of lands, may be supported by parol testimony, and it is not necessary that the fraud should be apparent on the deed. *Sandford v. Rose, ibid.* 428.

In *Connecticut*, in an action for fraud, in the sale of certain lands, if it appear that both parties had an equal opportunity of informing themselves, the plaintiff shall not recover. *Strong v. Peters*, 2 Root's Rep. 93.

An action for fraud in the sale of lands, will lie against the grantor and others, notwithstanding the covenants of seizin on the deed. *Bostwick v. Lewis*, 1 Day's Rep. 250.

No action lies against the vendors of real estate, for false and fraudulent representations, respecting its quality and situation. *Sherwood v. Salmon*, 2 Day's Rep. 128.

In a recent case it is doubted whether an action of *assumpsit* will lie to recover back the purchase money of real estate, where such money was obtained by false and fraudulent representations as to title? *Young v. Kenyon, ibid.* 352.

In a sale of lands, where the party has not received the thing contracted for, but a different thing which is of no value, he may recover the consideration paid for the land, in an action of *indebitatus assumpsit*, for money had and received. *Sandford v. Dodd, ibid.* 437.

In *New York*, where the trustees of an absconding debtor appointed under the Act of that State, sold his lands, and gave a deed conveying all the debtors right and title, and the purchase was evicted of a part of the land, it was held that the trustees were not liable to refund any part of the purchase money. *Trustees and persons acting in autre droit*, are not liable unless there be fraud or an express warranty. *Murray v. Trustees of the Ringwood Company*, 2 Johns. Cas. 278.

In *Pennsylvania*, the maxim of *caveat emptor*, applies to the sale of real estate. *Boyd v. Bopst*, 2 Dall. Rep. 91.

Wherever there is a gross misrepresentation of facts relating to the subject of the contract, the same is void and fraudulent. *Cochran et al. v. Cummings*, 4 Dall. Rep. 250.

Where the plaintiff, through imposition, mistake, or deceit, paid money for land, the purchaser can recover it back in an action of *assumpsit*, for money had and received. *D'Uricht v. Melchor*, 1 Dall. Rep. 428.

So in an action on a bond given, for the price of lands, want of title may be given in evidence, to avoid the payment of it, even though there were no evasion. *Carnahan v. Hall*, Addis. Rep. 127.

Equity will not decree the specific execution of an agreement respecting lands, the title whereof is defective; and in *Pennsylvania*, where the Courts of Law exercise certain equitable powers a man will not be compelled to pay for lands which he has purchased, though even with general warranty, where it plainly appears that he cannot obtain a good title. Per YEATES J. *Stoddart v. Smith*, 5 Binn. Rep. 355.

In a similar suit, on a bond given for lands in another State, the title comes into

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(1) Glaze-
brook v.
Woodrow,
3 T. Rep.
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Berkley,
Doug. 687.

plaintiff being ready, and offering to deliver them, the defendant precluded the necessity of a formal tender by a refusal beforehand to complete his contract.(1) If they were to be fetched away by the defendant, it must be shewn that the plaintiff was ready to have delivered them at the time, but that the defendant did not come or send for them.(y)

question incidentally, and may be used as a defence to such suit. *Clarke v. McIntire*, *Addis. Rep.* 235.

If there be in the sale of lands, any wilful misrepresentation or concealment of any material circumstance, it is such a fraud as will secure damages proportioned to the injury. *Work v. Grier*, *ibid.* 372.

In *Virginia*, on a sale of lands, if there be not a full representation of all the facts, it will be a good ground of avoiding the sale. *Jolliffe v. Hite*, 1 *Call's Rep.* 301.

Fraud is a ground of setting aside a sale of lands, even though perfected by conveyance. *Vance v. Walker*, 3 *Hen. & Munf. Rep.* 288. *S. P. Walker's exr. v. Nicklin*, 2 *Munf. Rep.* 357.

On a writ of error from *Kentucky*, to the Supreme Court of the *United States*, it was held that the vendor of real estate who sells on a description, is bound in equity to make good that description, and if it be untrue on a material part though through mistake, yet, he is liable for that variance. *McFerran v. Taylor*, 3 *Cranck's Rep.* 271.

Whether if the mistake be a matter deemed perfectly immaterial by both parties, and would not, if known, have varied the contract, and of which both parties were ignorant, ought a Court of Equity to interfere? *ibid.*

So in *North Carolina*, a recovery cannot be had on a note given for the purchase of lands to which the vendor had no title. *Welch et al. v. Watkins*, 1 *Hayw. Rep.* 369.

In *South Carolina*, misrepresentations as to the situation and quality of lands, are a ground of rescinding the contract, and may be given in evidence against a bond given for the consideration money, under the discount Act of that State. *The State v. Gaillard*, 2 *Bay's Rep.* 11.

The receipt of a full and valuable consideration in law, raises an implied warranty against all faults known and unknown to the seller. *ibid.* 19.

At a Sheriff's sale, caveat emptor is the rule, and the purchaser buys at his own risk. *Creditors of Thayer v. Sheriff of Charleston District*, *ibid.* 169.

In *Kentucky*, in the sale of a tract of land, the vendor committed a fraud on the vendee, by which the estate was lessened in value, and the Court under the particular circumstances of the case, did not set aside the contract, but decreed a pecuniary compensation to the vendee. *Porter v. Breckenridge*, *Hardin's Rep.* 21.

So where the vendees of land, agreed to risk the title, this was construed to mean against conflicting titles only, and that the vendor was answerable for a defect occasioned by a latent equity, to pay off the title which he sold. *Pile v. Shannon*, *ibid.* 53.

Where land is sold with warranty, and the vendee is evicted, he ought to recover of the vendor, not the value of the land at the time of eviction, but the purchase money with interest and costs. *Lowther v. The Commonwealth*, 1 *Hen. & Munf. Rep.* 202.

Where a person was bound to procure a tract of land, of a particular description, by the time the plaintiff shall come of age, and failed in so doing, the damages will be apportioned according to the value of the land at the time he arrived at such an age. *Howard v. Person*, 2 *Hayw. Rep.* 336.—AN ED.

Sales of Chattels.

(y) In a sale, if there be neither warranty nor fraud, the purchaser buys at his

The defendant may avoid the contract by shewing that the plaintiff was not able to fulfil it on his part, or was guilty of fraud in the making of it. If the defendant prove that the plaintiff has not a title, it is a sufficient answer to the action; and, in one case,⁽¹⁾ where two different lots had been sold at an auction, which the purchaser bought for their contiguity to each other, and the vendor had not a good title to one of them, Lord Kenyon held this fact as sufficient reason for his rescinding his contract as to both; and whether the objection to the title be, that such title is insufficient at law, or that there are equitable claims which would prevent the vendee from safely holding the purchased premises, it is equally an answer to the action of the vendor, or the foundation of one at the suit of the purchaser; for the intention of the contract being, that the purchaser should have a good title to the premises purchased, neither a Court of Law nor of Equity will compel him to take premises which may be immediately taken from him, or burthened with a charge which he did not contemplate or provide against.⁽²⁾ In one

Ch. II s. 1.
Actions by
vendors.

(1) *Gibson v. Spurrer*, Sittings after Mich. T. 36 Gr. 3 M. S. Chambers v. Griffiths, 1 Esp. Cas. 150, S. P.

peril; and no action will lie against the vendor, if the articles afterwards turn out defective. *Sexias v. Woods*, 2 Caines' Rep. 48. *S. P. Snell et al. v. Moses et al.* 1 Johns. Rep. 96. *Perry v. Aaron*, *ibid.* 129. *Defreeze v. Trumper*, *ibid.* 274. *Holden v. Dakin*, 4 Do. 421.

But there is an implied warranty as to the title of the vendor. *Defreeze v. Trumper*, 1 Johns. Rep. 274. Et vide *Heermance v. Vernoy*, 6 Do. 5.

A fair price paid for an article, does not imply a warranty of soundness. *Sexias v. Woods*, 2 Caines' Rep. 48. *Holden v. Dakin*, 4 Johns. Rep. 421.

Where the vendee purchases chattels on sight, which the vendor affirms to be worth much more than their real value, no action lies, there being neither fraud nor warranty. *Davis v. Meeker*, 5 Johns. Rep. 354.—AM. ED.

(2) If at the time of the contract, there is a lease outstanding, which was unknown to the vendee, he is not bound, but may rescind the contract, the vendor not being in a situation to give a perfect title. *Tucker v. Woods*, 12 Johns. Rep. 190.

A registered mortgage on the land, is such an incumbrance as authorises the purchaser to rescind the sale, although the registry is, in law, constructive notice of the existence of the mortgage. *Judson v. Wass*, 11 Do. 525. Et vide *Van Benthuysen et al. v. Crapser*, 8 Do. 198.

A purchase of land, with notice of a previous agreement between the vendor and another, takes the land subject to the agreement. *Les. of Simon v. Gibson et al.* 1 Yeates' Rep. 391.

Legal notice exists only when there is a violent presumption of actual notice. *Les. of Billington v. Welsh*, 5 Binn. Rep. 129.

Whether, in general, possession is evidence of a claim, *dubitat*. *Covert et al. v. Irwin et al.* 3 Serg. & R. Rep. 283.

Lis pendens, is a sufficient notice to a purchaser. *Walker v. Butz*, 1 Yeates' Rep. 574.

Where lands are sold at auction in separate lots, and several of the lots are purchased by one person, it is not an entire contract; and if the vendor cannot give a

Part. II.
Actions by
vendor.

(1) *Alpass v. Watkins*, 8 T. Rep. 516.

(2) *Elliott v. Edwards*, 3 Bos. & Pul 181.

Maberley v. Robins, 5 Taunt. 624.

(3) *Thompson v. Miles*, 1 Esp. Cas. 185.

(4) *Howard v. Castle*, 6 T. Rep. 642.

(5) *Bramwell v. All*, 3 Ves. jun. 620.

Action by
vendee.

(6) *Morton v. Lamb*, 7 T. Rep. 125.

(7) *Rawson v. Johnson*, 1 East, 203.

(8) *Wilkes v. Atkinson*, 1 Marsh. 142.

(9) *Seward v. Willock*, 5 East, 202.

case (1) the Court of King's Bench said, that a Court of Law could not take notice of an equitable title; but in subsequent cases, (2) where the point came directly before the Court, it was holden that an equitable objection to the title was equally strong with one founded on a legal defect. In general the title ought to be complete at the time by which it was stipulated to be made, but in one case, (3) where the defendant absolutely refused to receive any abstract, Lord KENYON held it to be sufficient for the plaintiff to shew a title at the time of the trial, though in fact it was not complete when he commenced his action. The employment of puffers by the seller, (4) whereby the price was raised upon the *bona fide* bidder, there being but one person who really bid, has been held to furnish a defence to an action for not completing the contract. But in the Court of Chancery Lord ALVANLEY, when Master of the Rolls, held (5) that the circumstance of a person being employed to buy in the estate, if the biddings did not amount to a certain sum, and bidding accordingly, at a sale which was attended by several real and *bona fide* bidders, was not sufficient to enable the highest bidder to avoid his contract.

When the action is brought *by a purchaser*, he must shew that he was ready to have accepted the thing purchased at the appointed time, and to have paid the stipulated price; to prove which, he must in general give evidence that he tendered the money, and in the case of a sale of lands, a conveyance, or draft of one, and demanded the execution of the conveyance, or delivery of the goods, (6) or, if they were to be taken to a certain place by the seller, that he was at the appointed place ready to receive them, and prepared with his money to have paid for them on delivery. (7) But where the seller has refused to deliver the goods, the very fact of the buyer demanding them, will be evidence of his being prepared with the money. (8) And in the case of a sale of lands, where a deposit has been paid, and the seller refuses to deliver an abstract, or delivers one which shews he cannot make a good title, it is not necessary for the purchaser to prepare a conveyance; but in case he has done no act to affirm the contract, he may immediately bring an action for money had and received against the auctioneer for the money deposited. (9) If, however, he has taken possession of the premises,

title as to all the lots, the vendee cannot rescind the agreement *in toto*, but must take a conveyance for such of the lots as the vendee is authorised to convey. *Van Eps v. The Mayor, &c. Schenectady*, 12 Johns. Rep. 436.—AM. ED.

or made any alteration in them so as to alter the condition of the seller, he cannot maintain this action, but must bring a special action on the contract.⁽¹⁾

Ch. II. s. 1.
Action by
vendee.

Contracts for the sale of goods are generally made on the expectation of a rise or fall in the price of fluctuating commodity, and the person whose speculation has failed, frequently breaks his contract. In these cases, therefore, it will also be important to prove the difference of price at the times of the making and of the breach of the contract, in order to ascertain the damages which the plaintiff has sustained.*

(1) Hunt v. Silk, 5 East, 449.

The case of *Peeram v. Palmer*, reported at length in *Gilb. L. E.* 194, and not noticed, as far as I can find, in any other book, contains an important decision as to the effect of a dispensation, by one party with an exact performance by the other, in contracts of this nature. The plaintiff bought of the defendant 100 quarters of barley, to be delivered to the plaintiff at *Hoddesdon*, between harvest and *Candlemas*, at the rate of 16s. per quarter, to be paid at the times of delivery, according to the quantity delivered at

Peeram v. Palmer, *Gilb. L. E.* 194.

* It must here be recollected, that I have taken the cases of an agreement where the purchase is to be completed, and the money paid at the same time; and therefore, before this is applied to any particular case, it must be well considered, whether, by the terms of the contract, the act of one party is a condition precedent to the act of the other, or whether they are independent. "Whether one promise be the consideration of another, or whether the performance, and not the mere promise be the consideration, must (as was observed by Mr. J. LAWRENCE, in *Glazebrook v. Woodrow*, 8 T. Rep. 373,) be gathered from and depend entirely upon the words and nature of the agreement;" but, (as was observed by Mr. J. LE BRANCH in the same case,) "No person shall call upon another to perform his part of a contract until he himself has performed all that he has stipulated to do as the consideration of the other's promise. This applies to every case of a sale of property, where one engages to convey on a certain day, and the other to pay at the same time; and this whether the one be stated in terms to be in consideration of the other or not. In neither case will the Court compel one party to perform his part until the other has done, or has offered to do his own." For the many nice distinctions which have been taken in these cases, see *Williams's Saunders*, 320, note (4) where all the cases as to this point are collected, except those before mentioned of *Glazebrook v. Woodrow*, and *Rawson v. Johnson*, 1 East's Rep. 203, which have been determined since the publication of that note. In the last case the Court said, that when the seller absolutely refused to deliver the goods sold, there was no necessity for the purchaser to make a formal tender of the money.†

† *A* in consideration of the covenants of *B*. in the same deed, covenants that he will purchase certain lands of *B*. then in possession of *A*. and will pay for the same a certain sum in four years, with interest annually; and *B* covenants that he will deliver to *A*. a conveyance of the land, upon his paying the said sums at the time or times mentioned. It was holden, that *B*. might recover the interest at the end of the three first years by way of rent; but that he could not recover the fourth year's interest, nor the principal sum, without making a tender of the conveyance. *Gardiner v. Corson*, 15 Mass. Rep. 500.—AM. ED.

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Action by
vendee.

Payne v.
Shadbolt,
Campb. 427.

each time. The defendant, on the day but one before *Candlemas*, delivered to the plaintiff's use, at the place appointed, a quantity of barley, which was sent for twenty quarters, but when the same was measured, it was found to be but nineteen quarters and a half. The barley being short of measure, the plaintiff paid to the defendant's servant 10*l.* and no more, though he had enough by him in the house to have paid for the whole 100 quarters, and before he brought the action he paid the other 6*l.* to the defendant. The case, having been reserved for the opinion of Lord C. J. PARKER, appears to have been argued at considerable length, and the principal point which was made in argument was, that these were mutual and independent promises. On this point, however, no opinion appears to have been given: but the Chief Justice held, that the defendant, having delivered nineteen quarters and a half without ready money, had dispensed with the condition as to that quantity, though he might have chosen whether he would have delivered it until he was paid, and then there was no reason but that he should not go on with the delivery of the residue according to his contract.^(a) But, where, in an action for the not delivering of wood, it appeared that the wood had been sold to be paid for on delivery by a bill at two months; and that the defendant had permitted the plaintiff to carry part away without receiving any bill; Lord ELLENBOROUGH held, that this was only a dispensation *pro tanto*, and that the vendor was at any time entitled to stand on his rights as they were originally established by the contract of sale.^(b)

Action on a warranty.

On a warranty.

In an action on a warranty, the plaintiff must prove the sale and warranty. In general any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount in law to a warranty; but where the defendant refers to any document, or to his belief only, in such case no action is maintainable, without proof that he knew he was representing a

(a) *Green v. Reynolds*, 2 Johns. Rep. 207. *West v. Emmons*, 5 Do 179. *Miller v. Druke*, 1 Caines' Rep. 45. *Seers v. Fowler*, 2 Johns. Rep. 272.—AM. ED.

(b) Where goods are sold to be paid for on delivery, if, on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods. *Palmer v. Hand*, 13 Johns. Rep. 434.—AM. ED.

falsehood.(c) Thus, where a man sold a horse, which he stated to be of a certain age, according to a pedigree delivered to him when he purchased the horse, and shewed the pedigree to the

Ch. II. s. 1.
Action by
vendee.

Sale of Chattels and Warranty.

(c) In *Connecticut*, an action will lie for a fraud in the sale of an order drawn by the Select men on the Town Treasurer. *Bacon v. Sanford*, 1 *Root's Rep.* 164.

The seller of a public security, runs the risk of its being true and genuine, especially if he affirm it to be such. *Turner v. Tuttle*, *ibid.* 350.

The law raises an implied warranty, that the thing sold is what it is held out to be, and if it be not, the seller must make good the damage, whether he knew of any defect or not. *Bailey v. Nichols*, 2 *Root's Rep.* 407.

In *New York*, it has been decided, that in an action on the case for selling one article for another, there must be either warranty or fraud; a sound price does not imply a warranty of soundness. *Seixas v. Woods*, 2 *Caines' Rep.* 48. *Snell et al. v. Moses et al* 1 *Johns. Rep.* 96. *Perry v. Aaron*, 1 *Johns. Rep.* 129. *Defreeze v. Trumper*, *ibid.* 274. *Holden v. Daken*, 4 *Do.* 421.

On a written warranty that a negro is sound, parol proof is admissible to shew that at the time of sale, the vendor informed the vendee of the defect and a warranty does not extend to visible defects. *Schuyler v. Russ*, 2 *Caines' Rep.* 202.

In an action of *assumpsit* on the sale of goods for not delivering goods of a certain description, but of a different sort and quality, either an express warranty or fraud must be alleged, and the plaintiff must prove the allegations precisely as they are laid. *Snell et al. v. Moses et al.* 1 *Johns. Rep.* 96.

So in an action of *assumpsit* for a fraud in the sale of cotton, it was held that the declaration should contain either an express warranty or an allegation that the vendor knew of the bad quality at the time he sold it as merchantable. *Perry v. Aaron*, *ibid.* 128.

In every sale of a personal chattel, there is an implied warranty in respect to the title of the vendor; *aliter* as to the quality or soundness of the thing sold. *Defreeze v. Trumper*, *ibid.* 274. *Heermance v. Verney*, 6 *Johns. Rep.* 5. *Chiss v. Wood*, *Hard. Rep.* 552.

The *English* rule of law as to sales in *market overt*, is not applicable to this State (*New York*) where no such institution or usage exists. *Wheelewright v. Depeyster*, 1 *Johns. Rep.* 471. So in *Pennsylvania*. *Hosack v. Weaver*, 1 *Yeates' Rep.* 478. *Hardy v. Metzger*, 2 *Do.* 347. *Easton v. Worthington*, 5 *Serg. & R. Rep.* 130.

Yet in another case it was ruled on a sale, in good faith and without warranty, the buyer of a personal chattel takes the risk. *Dortun v. Sammis*, 2 *Johns. Rep.* 179, (n).

The defendant sold to the plaintiff paints for good *Spanish-brown* and *White-lead*, and for a full price; the paints proved to be bad and of no value, it was held to make the defendant liable, there must be either an express warranty or fraud. *Holden v. Daken*, 4 *Johns. Rep.* 421.

If on a sale of goods, the vendor takes the notes of a third person, payable at a future day in payment, at his own risk, and where there is a fraudulent representation on the part of the vendee as to the note, the vendor may bring his action against the vendee immediately for goods sold and delivered. *Willson v. Fores*, 6 *Do.* 110.

If a contract be void on the ground of fraud, the party may waive it, and bring an action of *assumpsit*. *ibid.* *Kimball v. Cunningham*, 4 *Mass. Rep.* 502.

Assumpsit is the proper form of action where there is a warranty express or implied in the sale of chattels; but where the plaintiff grounds his action on deceit, or

Part II.
Action by
vender.

buyer, (1) Lord Kenyon held, that no action could be maintained against him, without proving that he knew the pedigree to be false: and in like manner, a representation that a picture is the

(1) *Dunlop v. Waugh, Peake's N. P. Cas. 123.*

fraud in the sale and not in a breach of contract, the deceit or fraud must be substantively alleged in the declaration, otherwise no proof of fraud is admissible. *Everton's exrs. v. Miles, 6 Johns Rep. 138.*

In *Pennsylvania*, the possession of chattels is a strong inducement to believe the possessor is the owner, and the act of selling them is such an affirmation of property, that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller. *Boyd v. Bopst, 2 Dull. Rep. 91.*

Where the plaintiff exchanged a horse with the defendant, and the latter possessed no title, the plaintiff may recover the value of his horse in an action of *assumpsit* for money had and received. *Hook v. Robison, Aldis. Rep. 271.*

If the vendor of a chattel know of a material defect, unknown to the vendee, who cannot with common prudence perceive it, it is such a fraud as will vitiate the contract, and the vendee may call for his money again. *Dixon v. M^cClutchey, ibid. 322.* Vide *Irwin v. Runkin, ibid. 146.*

In *North Carolina*, the rule of *caveat emptor* applies where a man purchases a chattel, not in the possession of the vendor. *Galbraith v. Whyte, 1 Hayw. Rep. 464.* So where the thing sold has some visible quality which lessens its value. *ibid.*

If a man sell an *unsound* horse, whose disorder is not known and receives the full value as for a *sound* horse, an action of *assumpsit* lies against the vendor, without an express warranty. *ibid.*

An action will lie for deceitfully asserting that an *unsound* mare is sound, with a fraudulent view, if the plaintiff be injured. *Irwin v. Sherri, Tayl. Rep. 1. Kimmel v. Lichty, 3 Yeates' Rep. 262.*

A full price, implies a warranty. *Toris v. Long, Tayl. Rep. 17.* See vide *Rivers v. Gruget, 2 Nott & M^cCord's Rep. 265. Rose et al. v. Beatie, ibid. 538.*

In an action on an implied warranty, the plaintiff need not prove the return of the thing bought. *ibid.*

But if the action were for the price of the chattel, such a return must be proved. *ibid.*

In *South Carolina*, in the sale of a negro, a sound price warrants against all faults and defects, known or unknown to the seller. *Timrod v. Shoolbred, 1 Bay's Rep. 324.* Vide *Rouple v. M^cCarty, ibid. 480,* on the same point.

A sound price deserves a sound commodity, whether known or unknown to the buyer. *The State v. Gaillard, 2 Bay's Rep. 11. Misson et al. v. Waldo et al. 2 Nott & M^cCord's Rep. 76.*

In this case, it was held that a *sound* price warrants a *sound* commodity, but where a buyer is informed fully of all the circumstances, and has a fair opportunity of informing himself of them, he shall be bound and held to his bargain, though it be a losing one. *Whitefield v. M^cLeod, 2 Bay's Rep. 380.*

Mere inadequacy of consideration, where there is no fraud, is not a sufficient ground for setting aside a contract. *ibid.*

In *Kentucky*, a vendor of a horse is answerable for a representation, which is false, whether it were the effect of fraud or mistake. *Baldwin v. West, Hardin's Rep. 50. (n)*

Yet in another case, in a suit for a deceit, it was ruled in selling an *unsound* horse, the declaration should aver either that the vendor falsely and fraudulently represented the horse sound, or that he knew him to be *unsound*. *Baldwin v. West, ibid. 50.*

In *New Orleans*, if a slave have at the time of the sale, the seeds of a disease, of

production of an ancient master, long since deceased, does not bind the party to a warranty that it is so; but is only a representation of the fact, according to the best of his belief; and therefore no action can be maintained, unless it be proved that the defendant in this case also knew, or had reason to believe, that he was representing a falsehood.⁽¹⁾ In these cases there was no breach of that good faith which the law expects in all contracts between man and man; but where a person knowing of defects in a ship, which it was impossible for the buyer to discover, did not disclose them to him at the time of sale, Lord KENYON held that he was liable to an action,⁽²⁾ as on a warranty that the ship was free from all latent and concealed defects, although, by the express terms of the contract, the buyer was to take her with all faults. In subsequent cases,⁽³⁾ however, this decision has been overruled, and it has been holden, that the seller is not answerable unless he has taken some means to conceal the defects.

When the unsoundness is proved, it is proper to shew an application to the vendor to take back the thing sold, and return the money, otherwise the plaintiff will not be entitled to recover for the keep;⁽⁴⁾ but this is not necessary to maintain the action, for the buyer may affirm the contract, and sue for damages occasioned by the breach of it, so that where the buyer of an unsound horse kept him⁽⁵⁾ and endeavoured to sell him, it was held that the action on the warranty was still maintainable.

If the buyer had the liberty of returning the thing bought, in case he disliked it, within a certain time, and did so accordingly; or if the defendant, on the horse being discovered to be unsound, consented to accept him back, and he was returned; the proof of these circumstances gives the plaintiff a right to recover back the whole money, as money had and received to his use. But the mere circumstance of the vendor, who had sold a

Ch II. s. 1.
Action by
vendee.

(1) *Jewdine v. Slade*, K. B. Sittings at Westm. after Tr. T. 37.
Geo. 3, M. S. Esp. Cas. 572, 5 C.

(2) *Mellish v. Moutaux*
Peake's Cas. 115.

(3) *Baglehole v. Waters*, 3 Campb. 154.
Pickering v. Dawson, 4 Taunt. 779.
Schider v. Heath, 3 Campb. 506.

(4) *Caswell v. Coore*, 2 Campb. 82.

(5) *Filder v. Starkin*, 1 H. Black. 17.

Towers v. Barrett, 1 T. Rep. 133.

Payne v. Whale, 7 East, 274.

which he afterwards dies, the vendor shall restore the price of the slave. *Dewees v. Morgan*, *Martin's Orl. T. R.* 1.

But in a contract for the sale of goods, without warranty of the quality, if there be no fraud on the part of the seller, he is not answerable for the quality. *Willing et al. v. Consequa* 1 *Peters' Rep.* 317.

In an action for the price of goods sold, the defendant may avail himself by way of set-off, of a breach of warranty of the goods, without returning the articles, or giving the vendor notice to take them away. *Steigleman v. Jeffries*, 1 *Serg. & R. Rep.* 477.

An assertion by the vendor to the vendee, at the time of selling a mare, that he is sure she is safe, and kind, and gentle in harness, amounts merely to a representation, and does not constitute a warranty or express promise that she is so. *Jackson v. Wetherill*, 7 *Do.* 480.—AM. ED.

Action by
Vendee.
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horse as a sound one, saying, in a subsequent conversation with the buyer, that if the horse were unsound he would take it again and return the money, (he at the same time insisting that the horse was sound,) will not enable the buyer to recover in an action for money had and received, because the original contract still remains open, and the breach of that contract the only cause of action.

Of the evidence in actions between the vendor and vendee of stock, or by the lender against the borrower thereof.

Vendor of
stock.

THE great quantity of property which is invested in the public funds has of late years given rise to a species of action unknown in earlier times, viz. that on a contract either to *transfer* or to *replace* stock at some future day; and as these contracts are most commonly reduced into writing they will properly form a part of this section.

Vide Stat.
7 Geo. 2, c. 8.

When an action is brought by the *seller* against the *purchaser* for not *accepting* stock, the first fact to be proved is, that the plaintiff was actually possessed of stock to the amount for which he contracted.* He must then prove the contract, and next, either that he made an actual transfer of the stock, or else that he attended at the Bank for the purpose of transferring it, till the books shut, on the day whereon it was to be transferred. In the latter case he must also prove, that he afterwards sold and actually transferred the stock to some third person, which should be done as soon as possible.(1) In a late case,(2) which arose on this subject, the Judges of the Court of King's Bench expressed considerable doubt, whether the transfer to the third person should not be made at the next transfer day after the contract was broken; but the majority of the Court inclined to think that it was sufficient if made within a reasonable distance of time afterwards, and that in case the stock had borne a higher price in the intermediate time, the defendant should have the benefit of that circumstance by making that higher price the measure of the damages.

(1) *Bordenave v. Gregory*, 5 East, 107. *Heckscher v. Gregory*, 4 East, 607.

(2) *Bordenave v. Gregory*, ubi sup.

* This fact, and all others which have reference to the books of the Bank, must be proved by examined copies from the Bank books (vide ante, 80, and *Marsh v. Colnet*, 2 Esp. 665,) to obtain which a *subpoena duces tecum* should be served on one of the clerks at the office where the books are kept, and application made to the Bank solicitor, who will represent to the Bank the propriety of the clerk's attending with a copy from the book.

In case the action is brought by the *purchaser*, he also must prove that the seller was possessed of the stock at the time of the contract; that he tendered the money and requested a transfer, which the other refused; (d) or that he attended at the Bank to accept the transfer, and was prepared with money to pay for it, which could be inferred from a demand and refusal; (1) and lastly, that he actually bought and duly accepted the same quantity of stock of another person at a greater price.

Ch. II. s. 1.
Vendor of
stock.

Vide Calonel
v. Briggs,
Salk. 113, and
the above
cases.

(1) Vide
Wilkes v.
Atkinson,
ante, 239, 7
Geo. 2, c. 7, 8.

In the second kind of action, viz. that for not *replacing* stock, the plaintiff must first prove that being possessed of the stock in question, he sold it out at the time mentioned in the declaration, and advanced the produce to the defendant, on his promise to replace it. He must then prove, by some person conversant with the funds, the current price of stock at the day on which it ought to have been replaced; and if it has risen since that time, and there has been no offer on the part of the defendant to replace it, he should also prove the price it has since borne; for, as the contract was specifically to replace the stock, and the plaintiff might, in case the contract had not been broken, have sold out the stock at any time afterwards, he is, according to one case, (2) entitled to receive in damages the highest price at which he might have sold it, had the defendant performed his contract. But in another case, (3) where it appeared from the plaintiff's letters, that he wanted a re-payment in money and not in stock, the Court held that he could only recover the price at the day when it ought to be replaced, or at the day of the day of trial, (at his option) without considering whether any higher price might have been obtained at any intermediate day.

(2) Shepherd
v. Johnson,
2 East, 211.

(3) M'Arther
v. Lord Sea-
forth, 2 Taunt.
257.

SECTION II.

Of the evidence on parol and implied promises.

THE several instances which have been noticed were cases of *actual* and *express* promises; but the far greater number of actions of *assumpsit* are founded on promises *implied* by operation of law. This implication may arise either from the common and universal practice of mankind, or the usage of particular trades. If I order goods of a man, or employ him to do work, and no mention is made of the sum which is to be paid, the law

Goods sold
and delivered
&c.

(d) A contract for the delivery of a certain amount of 6 per cent stock at a future period, for a certain price, is lawful, and the vendor is not bound to make the transfer without receiving the money. *Gilchreest v. Pollock*, 2 *Yeates' Rep.* 18.—*Am. Ed.*

Part II.
Quantum
meruit.

implies a promise to pay the value of the goods, or as much as he deserves for the work : and in an action for it, the plaintiff must prove the delivery of the goods, or performance of the work and the usual prices charged for them : but it must appear that these *usual* prices are also a reasonable compensation for the charges of 5*l.* per cent. by a surveyor ?(1) or 7½*l.* per cent. by an auctioneer(2) on a large building or sale ; though proved to be *usual*, have not been allowed.

(1) *Updel v. Stuart, Peak. Cas.* 193.

(2) *Mulby v. Christie*, 1 Esp. Cas. 340. Sed vide post.

It will be proper here to observe, that the question of value can never arise where a certain sum is agreed upon, unless it be apparent that a gross fraud has been committed, as was the case where a man agreed to give a farthing a nail for a horse, doubling it each time,(3) which would have amounted to an immense sum of money, and such as no man, who could have calculated the amount, would have agreed to give. But where a certain sum of money has been agreed to be given for any work of art (a portrait for instance) which is not properly executed, the defendant should return it, and will not be permitted to retain it, and enter into the comparative value.(4)

(3) *Vide* 1 Vent. 267. Bul. N. P. 156.

(4) *Grimaldi v. White*, 4 Esp. Cas. 95.

Delivery to a carrier or other agent.

In order to shew a delivery of goods, the plaintiff must either prove that they were delivered at the defendant's house, or to some person authorised by him to receive them ;(e) as if he name a particular carrier, or desire them to be sent by land carriage, and there is but one carrier to the place where he resides ; the delivery to the carrier is a complete delivery to the purchaser, and he is answerable for them whether they ever arrive or not.(5) From these cases it would seem, that unless the purchaser point out a particular mode of conveyance, the seller sends them

(5) *Veale v. Bayle*, Cowp. 294. Bul. N. P. 36. *Haynes v. Wood*, 1b.

(e) On a contract for the sale of goods, the right of the vendor is divested immediately after the contract of sale is made in favour of the vendee, *unless it be otherwise agreed* ; and even then the vendor may, by his contract, renounce the benefit of the conditions stipulated. *Leedom et al. v. Phillips*, 1 Yeates' Rep. 527.

If the vendor relies on the promise of the vendee to perform the conditions of sale, and deliver the goods accordingly, the right of property is changed, although the conditions be not performed. But where performance and delivery are understood by the parties to be simultaneous, possession obtained by artifice and deceit, will not change the property. *Harris v. Smith*, 3 Serg. & R. Rep. 20.

On a contract for the sale of goods, the vendor, if the goods are bulky, must give notice to the buyer that he is *ready to deliver them*, and on the vendee failing to take them away, the vendor may, on due notice, sell them at public auction, and charge the vendee with the difference of price. *Girard v. Taggart*, 5 Serg. & R. Rep. 19.

A delivery of the key of the warehouse in which goods sold are deposited, is a sufficient delivery of the goods to transfer the property. *Wilkes v. Ferris*, 5 Johns. Rep. 335. Et vide *Jewett v. Warren*, 12 Mass. Rep. 300.

The property in a vessel passes by delivery only, without a bill of sale. *Wendover et al. v. Hogeboom et al.* 7 Johns. Rep. 308. Sed vide *Woods v. Courter et al.* 1 Dall. Rep. 141.—AM Ed.

at his own risk, and that before he can charge the purchaser with the value of them, he must prove not only the delivery of them to the carrier, but also call some servant of the carrier to prove that he delivered them to the defendant.^(f) But in a late case,⁽¹⁾ the Court of Common Pleas held, that delivery of the goods by the vendor to a carrier, not named by the vendee to be taken to him, was a delivery to the vendee, and he was chargeable. Lord ALVANLEY, delivering the opinion of the Court, said, "it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods, it is at his risk."

The same doctrine is laid down in a former case at *Nisi Prius*;⁽²⁾ we may therefore consider it to be now settled, that by a general order to send the goods by a carrier, the vendee adopts as his agent any carrier who may be appointed by the vendor.*

Proof of the delivery of meat, or other things commonly used in a family, at a man's house, is *prima facie* evidence that he ordered them on credit, and the law implies a promise to pay the value; which being proved, the plaintiff is entitled to a verdict for so much. If it be proved that the defendant's wife, or his servant, ordered them, the case is carried a step further, and the presumption is stronger, that they had his authority so to do;⁽³⁾ and if it be also proved, that he has been accustomed to pay for goods so ordered, it is conclusive against him, and nothing

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&c.

(1) Dutton v.
Solomonson,
3 Bos. & Pul.
582.

(2) Vide 3 P.
Will. 186;
and King v.
Meredith, 2
Camp. 639.
Cooke v. Lud-
low, 2 N.
Rep. 119.

(3) Manby v.
Scott, 1 Sid.
109. Gilb.
L. E. 183.

(f) If a person sends an order to a merchant to send him a quantity of goods on certain terms of credit, and the merchant sends a *less* quantity, on a *shorter* credit; and the goods sent are lost by the way; the vendee must bear the loss, for there is no contract express or implied between the parties. *Bruce et al. v. Pearson*, 3 Johns. Rep. 526.

A promise made upon terms to which the other party does not assent, ceases to be binding. *Tuttle v. Love*, 7 Johns. Rep. 470.—Am. Ed.

* In *Anderson v. Hodgson*, 5 Price, 650, the Court of Exchequer held, that an order by the defendant to send goods to a certain quay, to be left there till called for, without shewing an acceptance of the goods by the vendee after their arrival at the quay, did not support an action for goods sold and delivered, where the goods had been delivered at another quay for the purpose of being forwarded by a vessel passing between the two, although they had afterwards arrived at the quay named by the vendee; and Garrow B. observed, that "if Lord ALVANLEY could be supposed to have determined that a delivery generally to a common carrier, would have been sufficient to sustain the action, he should dissent from that opinion."

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Contract by
agent, wife,
&c.

(1) Vide
Strubbing v.
Heintz, Peak
Cas. 47.

(2) Holt v.
Brien, 4 M.
& S. 252.

(3) Vide
Strubbing v.
Heintz, Peak
Cas. 47.

(4) Bentley
v. Griffin,
5 Taunt. 356.

(5) Ethering-
ton v. Parrot,
1 Salk. 118.

(6) Boulton
v. Prentice,
2 Stra. 1214.

(7) Harris v.
Morris, 4 Esp.
Cas. 41.

(8) Manwar-
ing v. Sands,
2 Stra. 706.

(9) Vide 1 Ld.
Raym. 444.

short of payment to the creditor will discharge him from the action. (1) But the two first cases, resting only on presumption, may be destroyed by evidence, which shews that the defendant never entrusted his wife or servant to buy on credit, and that it was known to the plaintiff; for if the defendant prove that he gave them money to pay for the articles as they bought them, or that during a temporary absence, he made an allowance to the wife for the supply of necessaries for herself and family, (2) and that the plaintiff knew of or was acquainted with the fact, or that his usual custom was to pay the plaintiff weekly, (3) this shews that he never did authorise them to contract for him, and he is not bound by their contract. The case of clothes furnished to a married woman is similar in its nature, if suitable to the husband's station in life, the presumption is that he authorised his wife to buy them; but if it should appear that he gave her money to pay for them, or desired the plaintiff, or his servant, not to trust her, or if from other circumstances it appears that the tradesmen gave credit to the wife and not to the husband, (4) the husband will not be liable. (5) (g)

In cases where the husband and wife are parted, the law proceeds on a different principle: it does not there look to the *will*, but to the *duty* of the husband: if he turn his wife out of his house, or behave so cruelly to her, that she cannot with safety remain in it, he is liable for articles of provision and dress, suitable to his station, furnished to her by a third person, though against his express direction; for the law will not permit her to starve: and proof of the articles having been delivered, and that the defendant is her husband, is sufficient for the plaintiff to charge him. (6) To discharge himself from the action, it is incumbent on the husband to prove that the wife has forfeited her claim to his protection, by living in a state of adultery at the time the goods were furnished, (for the mere circumstance of her having formerly committed adultery will not be a defence, if the husband afterwards received her back, and turned her out a second time; (7)) or that she left his house against his consent, and without reasonable cause; (8) or refuses to return; and in the latter case it should also be proved, that either a general notice was published by the husband to all persons not to trust his wife, or a particular notice given to the plaintiff. (9)

If the husband and wife are parted by mutual consent, and she has a separate maintenance allowed by him, he will not be

(g) Vide ante, p. 39, n. (h)—AM. EN.

liable even for necessities found her: and the general and public notoriety of their being so parted is sufficient, without proof of particular notice to the plaintiff.(1)

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agent, wife,
&c.

In the case of persons of an inferior station in life, the earnings of the wife had been held equivalent to an allowance by the husband:(2) but where the wife of a gentleman of rank and fortune was parted from him without any allowance by him, though she had a pension of 400*l.* a year, during the pleasure of the crown, the husband was held liable to her contract for necessities.(3)*

(1) Todd v.
Strokes, Salk.
16. Vide Bul.
N. P. 135.

(2) Warr v.
Huntley,
Salk. 118.
N. P. 135.

(3) Thompson
v. Harvey,
4 Burr. 2177.

Action for money paid to the defendant's use; for money lent; and on an account stated.

To support the action for *money paid* to the defendant's use, the plaintiff must prove either that he has paid such money at the request of the defendant, or else that he has been compelled to pay it, in consequence of his misconduct, or of an engagement which the plaintiff had entered into on his behalf, or in a case where they were jointly liable, and where the defendant ought to have paid his proportion; for no man can of his own act make another his debtor against his will.†(h)

Money paid.

Stokes v.
Lewis,
1 T. Rep. 20.
Child v. Mor-
ley, 8 T. Rep.
610.

In the second of these cases, as where the goods of *A.* a lodger in the house of *B.* are distrained by the landlord, and *A.* brings an action against *B.* to recover the money which he has been obliged to pay to redeem his goods, he must prove that the money was due, and a distress made, and that he gave notice to *B.* of it, and requested him to pay the money, or indemnify him in replevying the goods, and that on such refusal he paid it himself.‡

* The numerous cases which have arisen on this subject are collected together in Mr. Nolan's edition of *Strange*, 1214, note (1.)

† In general one partner cannot maintain an action at law against another for the non-performance of any duty owing from him as partner, unless on an express covenant or stipulation; but where *A.* agreed with *B.* to take one-half share of certain goods bought by *B.* and to bear half of any loss that might arise on them, or have half the profit that might be made, and to furnish *B.* with half the amount of the purchase money in time for payment, it was holden that an action for money paid to the use of *A.* lay against him for his moiety of the price, for that was to be furnished by him in the first instance, although there might be an account to be taken between them as partners upon the subsequent disposal of the stock. *Venning v. Leckie*, 13 *East*, 7.

(h) Vide ante, p. 302, n. (a)—AM. ED.

‡ *Exall v. Partridge*, 8 T. Rep. 308. In this case it was held, that if a lease be

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Money paid.

Moore v.
Pyrke,
11 East, 52.

(1) Taylor
v. Higgins,
3 East 169.
Maxwell v.
Jameson,
2 B. & A. 52.

(2) Spurrier
v. Elderton,
5 Esp. Cas. 1.

And here it should be observed, that an actual payment must be proved to maintain this action; for, if instead of paying the money, *A.* were to permit the landlord to sell his goods, a special action on the case would be his only remedy; for immediately on the sale, the money paid by the purchaser vests in the landlord in satisfaction of the rent, and never is the money of the person whose goods are distrained; and in like manner, where the surety has the old security cancelled, and gives a new one this form of action has been considered as equally insupportable. (1) So where an auctioneer having been employed to sell an estate, the seller's title to which was defective, the purchaser brought an action against the auctioneer to recover back the deposit money, and the seller refusing on notice to defend the action, the auctioneer paid the deposit, and also the costs of the action and his own attorney's costs, and then brought an action against the seller for money paid to his use. Lord ELLENBOROUGH held, that he could only recover the deposit in this form of action, a special count being necessary to recover the costs. (2)

If the payment were made in consequence of a bond, wherein the plaintiff became bound as surety for the defendant, the first proof will be the due execution of the bond by them both; then that the plaintiff was called upon to pay the money, and gave notice thereof to the defendant before he paid it. To prove the payment of the money in these cases, the person who made it, or he by whom it was received, should be called as a witness, for the receipt or acknowledgment of that person will be no evidence against the defendant; and if levied under an execution, a copy of the writ should be proved. (i) In case there are two

made to *A. B.* and *C.* and *B.* and *C.* assign to *A.* who occupies the premises, and goods are bailed to him by *D.* which are distrained by the landlord for rent due from *A. B. C.* they are all liable to an action at the suit of *D.* though he knew of the assignment.

Action by surety against his principal.

(i) A surety may recover of his principal, though the money was paid for him, on an usurious contract made by the principal, and which he might have avoided. *Ford v. Keith*, 1 Mass. Rep. 139.

An action for money *had and received*, will not lie in such a case; it should be for money *laid out* and expended. *ibid.*

If the surety in a contract, or his executor or administrator, pay the money due on the contract, although the creditor could not have enforced payment by action against him, he may recover of the principal the money so paid, if the principal were legally bound to pay it. *Shaw et al. v. Loud*, 19 Do. 447.

But if a person become surety at the request of another surety, who pays the debt, the former is not liable to the latter for a contribution. *Taylor v. Savage*, *ibid.* 98.

sureties, each must bring a separate action for the money which he personally paid ;(1) and where several persons become sureties for a third, and one has been obliged to pay the whole debt, he may, by separate actions against each of the others, compel them to contribute their respective proportions towards his loss.(2) In this case the obligation of the plaintiff, the defendant, and the other sureties must be proved, the application to them, and the payment by the plaintiff. It was in one case held, that where a bill of exchange had been drawn by one of three partners, in the name of himself and the others, after the dissolution of the partnership, in favour of a person who did not know of such dissolution, and the other two partners had thereby been obliged to pay the money that they might join in an action to recover it ;(3) but this case was decided under very particular circumstances ; viz. it clearly appearing that the plaintiffs had jointly borrowed the money, and had given a joint note for

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(1) Beard v. Boulcott, 3 Bos. & Pul. 235.

(2) Cowell v. Edwards, 3 Bos. & Pul. 268.

(3) Osborne v. Harper, 5 East, 225.

A surety may maintain an action of *assumpsit* for money paid, where the surety in a bond, has paid the proper debt of the principal. *Bunce v. Bunce, Kirk. Rep.* 137.

But an action will not lie on a general promise of indemnity upon a mere liability in the surety to be sued or called upon for the debt. *Brentnall v. Holmes, 1 Root's Rep.* 391.

Where a bond with sureties is given to the *United States* for duties, and *A.* is mentioned as the importer, and *B.* the surety pays the bond, he may maintain an action of *assumpsit* against *A.* though in fact a third person was the real owner of the goods. *Sluby v. Champlin, 4 Johns. Rep.* 461.

A surety *qua* surety, cannot call on his principal at law, until he has actually paid the money. *Powell v. Smith, 8 Johns. Rep.* 192. *Pigon v. French, C. C. April, 1805, M. S. Rep.*

A surety who has paid the debt of the principal, is entitled to be put in the place of the creditor, and to all the means which the creditor possessed, to enforce payment against the principal debtor. *Clasen et al. v. Morris et al. 10 Do.* 525.

It seems Chancery would compel the creditor to assign to the party the judgment against the principal creditor. *ibid.*

One surety in an administration bond, cannot bring an action against his co-surety, for an alleged default in the administrator, before he has been damnified in his character of surety. *The People v. Duncan, 1 Do.* 311.

When the principal assigns a fund to trustees, to pay a creditor, whom the surety afterwards pays, and the proceeds of the fund are then paid over by the trustees, the surety is entitled to the benefit of the fund, and may recover it from the person who possesses it, in an action of *assumpsit* for money had and received in his own name. *Miller et al. v. Ord, 2 Binn. Rep.* 382.

Where money is paid by a surety for two principals, the law implies a promise, by each principal, to reimburse the surety for the whole amount paid. *Duncan et al. v. Keiffer, 3 Binn. Rep.* 126.

The surety is entitled to recover of the principal, just the same specific thing which he has been adjudged to pay. *Graves v. Webb, 1 Call's Rep.* 443.

An action will lie by the surety against the principal on a bond of indemnification,

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part of it, and on that ground only the joint action was maintained. (k)

In the cases which have been just mentioned, the law implies a promise of indemnity, and such promise arises in every case

after the rendition of judgment, without proof of satisfaction of the judgment. *Murrell v. Johnson*, 1 *Hen. & Munf. Rep.* 449.—A. M. Ed.

Contribution of joint trespassers, co-sureties, &c.

(k) In a recovery for a *tort*, no contribution can be compelled, if one of the defendants have been obliged to pay the contents of the whole execution. *Wilford et al. v. Grant*, *Kirb. Rep.* 114.

A. B. and eight others made a purchase, and gave their joint bond. All signed as the securities of each, though they were severally to pay different shares of the amount; A. became a bankrupt before payment of his share, B. then paid one-ninth part of A.'s share and a small sum over; after which B. brought a *bill in Chancery*, against the other co-obligors for a contribution. The Court decreed that each of the respondents to that bill, should pay to the obligee, one-ninth part of the loss arising from the bankruptcy of A. and also pay to the complainant, one-eighth part of the surplus advanced by him. *Hyde v. Tracey*, 2 *Day's Rep.* 491.

A surety in an administration bond, cannot maintain an action against his co-surety for a default in the principal, if such surety have not been damnified even though he be a creditor. *The People v. Duncan*, 1 *Johns. Rep.* 310.

In *North Carolina*, it has been decided that a surety in a bond, cannot maintain an action *at law* against his co-surety for a moiety of the money paid for their principal without an express *assumpsit*, his relief being in *equity*. *Carrington v. Carson*, *Rep. in Co. of Conf.* 216. *S. P. Robinson v. Kenon*, 2 *Hayw. Rep.* 181.

But where one of five partners executed a bond, with a surety, for duties on goods imported by the firm, the obligor partner died, and the surety paid the amount; it was held he could not recover contribution from the other four partners. *Tom v. Goodrich et al.* 2 *Johns. Rep.* 213.

When a suit is brought on a bond, accompanying a mortgage, the Court will not interfere to prevent the plaintiff from levying on what lands he pleases, but when the money is brought into Court, they will decide who shall make contribution. *Morris's exrs. v. M'Conaughey's exrs.* 1 *Yeates' Rep.* 9.

A. mortgages land and dies, after having devised all his estate to B. who devised the mortgaged premises to C. for life, with power to dispose thereof by will, and gives the rest of her estate to her executors, who sell part of it for the payment of debts; judgment having been obtained on the bond accompanying the mortgage, the Sheriff levies on all the land undisposed of; *adjudged*, that all the lands levied on shall contribute according to the value of the several tracts. *Morris's exrs. v. M'Conaughey's exrs.* 2 *Dall. Rep.* 189. *S. C.* 1 *Yeates' Rep.* 189.

A Court of Equity will not compel a surety in a bond to contribute to the relief of his co-surety who has been forced to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent. *M'Cormack's admr. v. O'Bannon's exr.* 3 *Munf. Rep.* 484.

The defendant's signed a call to a minister of the Presbyterian church, in which they promised to provide for his maintenance, "in the manner set forth in the subscription papers accompanying the call." By that paper they promised "to pay him, or his order, the sums annexed to their names, yearly, and every year," &c. with liberty to any subscriber to withdraw at the end of the year. Held, that they

where they are jointly liable to a third person upon their joint contract. But in cases where two are jointly sued in *tort*, or trespass, and the whole damages are levied upon one, the law does not raise any such promise. (1) To recover a contribution or indemnity, therefore, in a case of this sort, the plaintiff must prove an *express* promise on the part of the defendant; and it has been held that such express promise will support the action even in a case where neither the plaintiff nor defendant were liable to pay the money; for where two persons were jointly engaged in an illegal stock-jobbing transaction, and one, by the express authority and direction of the other, paid the whole loss, it was held that he might recover a moiety of it from the other. (2)

To support the action for *money lent*, the plaintiff must prove that money was lent by him to the defendant, either by calling some person who was present, or by proving the defendant's acknowledgment, which it has been held a promissory note amounts to, and is therefore evidence on this count. (3) But the bare circumstance of the plaintiff having drawn a check on his banker, and of the defendant having received the money, is not sufficient evidence, without also shewing some money transactions between them, from whence a loan might be inferred, for *prima facie* the check imports a payment, and not a loan. (4)

The action on an *account stated*, must be supported by evidence of a settlement of accounts between the defendant and the plaintiff, or some person on his behalf. (1) And though the reckoning be only of what is due to the plaintiff, without any counter demand by the defendant, it is sufficient to sustain the count, as where the defendant and the plaintiff's wife reckoned that the defendant had borrowed at one time 40*s.* at another 40*s.* and at another 4*l.* making together 8*l.* it was objected, that this

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(1) Merryweather v. Nixon, 8 T. Rep. 186.
Farebrother v. Analev, 1 Campb. 343.
Wilson v. Milner, 2 Campb. 452.

(2) Petrie v. Hannay, 3 T. Rep. 418.
Sed vide Aubert v. Mace, 2 B. & P. 371.
Sivers v. Lashley, 6 T. R. p. 61.
Brow v. Turner, 7 T. Rep. 730; and Cannon v. Brice, 3 Barn. & Ald. 179.
in which this case was expressly overruled.

(3) Vid. Story v. Atkins, 2 Stra. 719; B. N. P. 137.
and Harris v. Hantbach, 1 Burr. 378.

(4) Cary v. Garrieh, 4 Esp. Cas. 9.
Aubert v. Walsh, 4 Taunt. 223.

were not bound jointly for the whole subscription, but each for himself, to the amount of his own subscription. *Riddle et al. v. Stevens*, 2 Serg. & R. Rep. 537.—AM. Ed.

(1) *Joint partners*, in a mercantile transaction, may have account render against each other by the common law. *Tenants in common*, by the 27th sect. of the Stat. 4 Anne, c. 16, in *Pennsylvania*. *Griffith v. Willing et al.* 3 Binn. Rep. 317.

To support an action of account render, a contract either express or implied must be shewn. *King of France v. Morris*, cited 3 Yeates' Rep. 251.

If a partner acknowledge the correctness of the credits and debits of an account taken from a ledger, the entries of which were nearly all in his own hand-writing, but at the same time deny his obligation to pay the balance, alleging the existence of a partnership between himself and the plaintiffs, this is not sufficient upon an *in simul computassent*. *Gill et al. v. Kuhn*, 6 Serg. & R. Rep. 333.—AM. Ed.

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Action for
money lent.

(1) *Stuart v. Rowland*, 1 Show. 215.

(2) *Knowles v. Michel*, 13 East, 249.

(3) *Forster v. Allison*, 2 T. Rep. 479; and *Moravia v. Levy*, *ibid.* 483.

(4) *Moore and another v. Hill*, Sitt. Guildh. after East, 1795, M. S. See cases cited 2 T. R. 480.

being a reckoning on one side only, without deduction or payment on the other, did not support the count; but this objection was over-ruled. (1) So where the defendant admitted that he had bought standing trees of the plaintiff for a certain sum of money; and that he had cut them down and carried them away; this also was holden sufficient. (2) If two persons are in partnership, and covenant to account with each other, though no action of *assumpsit* will lie on these articles, till an account has been settled and liquidated, yet after such an account has been taken, and the balance struck, *assumpsit* will lie, as on an account stated; (3) (m) and where there being accounts between *A.* and *B.*, *C.* became a partner with *B.* and dealings continued between *B.* and *C.* as partners, and *A.* who afterwards settled an account with *B.* and *C.* wherein was included the money due from *A.* to *B.* alone, (4) Lord KENTON held that the whole might be given in evidence under a count on an *account stated*, in an action by *B.* and *C.* But money due from an executor, or from the defendant's wife whilst sole, cannot be blended with an account of the defendant as an individual, so as to make him generally liable, though in fact included in the same account.

Action for use and occupation.

Action for use
and occu-
pation.

ANOTHER action, which generally arises on a parol or implied promise, is the action for *use and occupation*, which is given by the Statute 11 Geo. 2, c. 19, s. 14, by which it is enacted, that "where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the lands, &c. occupied by the defendant, in an action on the case for the use and occupation of what was so held and enjoyed; and if it shall appear that there was a parol demise, or an agreement (not being by deed) whereon a certain rent was reserved, the plaintiff shall not therefore be nonsuited, but shall make use thereof as evidence of the quantum of the damages to be recovered." And by the same Act, sect. 15, "if a tenant for life die before or on the day on which any rent was made payable upon any lease which determined on the death of such tenant for life, his executors may, in an action on the case, recover the whole, or a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, in which the said rent was growing due.

(m) *Beach v. Hotchkiss*, 2 Con. Rep. 425.—AN. ED.

Since the Statute, this is become the common form of action in all cases where the demise is not by deed, and even where there is an agreement under seal for a future lease, if such agreement do not contain words of present demise, or a covenant to pay rent, it may be used as evidence in this form of action.

To support the action, the plaintiff must shew that the defendant occupied under his permission, or that of some person through whom he claims, for a mere stranger cannot try his title in this form of action.⁽¹⁾⁽ⁿ⁾ He must therefore prove ei-

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Action for use
and occu-
pation.

Bannister v.
Usborne, K.
B. Sitt. after
Hil. T. 36
Geo. 3. Elliot
v Rogers. 4
Esp. 59, S. P.

(1) Morgan v.
Ambrose, cor.
Wilmut, J.
Moumo Sum.
Ass. 1756.
M. 8.

(n) In *Connecticut*, an action of *indebitatus assumpsit*, will lie for the rents and profits of lands, and such an action is not within the Statute of Frauds and Perjuries. *Rogers v. Tracey*, 1 Root's Rep. 233.

In *Pennsylvania*, *indebitatus assumpsit* for money had and received, will lie against the executors of an int-estate, who had in his life-time received the rents and profits of an estate, of which he had wrongfully possessed himself. *Baldane et al. v. Duche's exrs.* 2 Dall. Rep. 176. S. C. 1 Yeates' Rep. 121.

But such an action will not lie where the defendant believed he possessed a title, even though he had been evicted. *Whurton et al. v. Fitzgerald*, 3 Dall. Rep. 503.

To support an action for use and occupation, since the Stat. 11 Geo. 2, c. 19, sec. XIV. a promise, either express or implied, must be shewn, and proof given that the defendant came into possession by permission of the plaintiff; or, at least, such strong circumstances must be shewn as would preclude the idea of an adversary claim. *Pott v. Lasher*, 1 Yeates' Rep. 576.

In *assumpsit* for use and occupation, the plaintiff must prove a contract, but the proof may be either direct or presumptive. If he prove that the defendant occupied the land by his permission, it is enough, and the law will in such case imply that the defendant promised to pay a reasonable rent. *Henwood v. Cheeseman*, 3 Serg. & R. Rep. 500. Et vide *Osgood v. Dewey*, 13 Johns. Rep. 240.

But if the defendant came on as a trespasser, the plaintiff cannot recover. *ibid.* 3 Serg. & R. Rep. 500.

In *Virginia*, *assumpsit* for use and occupation of land, by permission and assent of the plaintiff, on an express promise to pay the plaintiff a certain sum, or in general terms, to pay him to his satisfaction, for such use and occupation lies at common law, independently of the Statute of 11 Geo. 2, c. 19. *Eppes's exrs. v. Cole et al.* 4 Hen. & Munf. Rep. 161.

It would seem that such an action is maintainable without proof of an express promise, but this point was left open. *ibid.*

In *North Carolina*, it seems that *indebitatus assumpsit* will lie for the rents and profits of land, on a promise either express or implied. *Hayes v. Acre*, Rep. in Co. of Conf. 19. 1 Hayw. Rep. 485.

In *South Carolina*, though no distress can be made for rent, unless some specific sum be reserved in a deed, or by parol agreement, yet in such a case *assumpsit* for the use and occupation of the premises will be sustained. *Smith v. The Sheriff of Charleston District*, 1 Bay's Rep. 443.

Where there is a contract for the purchase of land, under which the purchaser enters into possession, but afterwards refuses to complete the purchase; the vendor cannot maintain an action of *assumpsit* for use and occupation, but must resort to an action of trespass and ejectment, to recover the *mesne profits*. *Smith v. Stewart*, 6 Johns. Rep. 46.

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Action for use
and occupa-
tion.

(1) *Panton v. Jones*, 3 Campb. 372.

(2) *Ball v. Sibbs*, 8 T. Rep. 327.

(3) *Naish v. Tatlock*, 2 H. Black. 319.

ther an actual demise, the payment of former rent, either in the usual course, (in which case it will be proper to give the defendant notice to produce the receipts,) or under a distress made by the plaintiff (in which case the notice of distress should be proved ;)(1) or, as in the case above-mentioned, a permission to enter and hold until a formal lease or future conveyance should be executed. If it be proved that the defendant entered by permission of the plaintiff, and then that he demised to another, who occupied, this will be evidence of an occupation by him, and the rent may be recovered from him in this form of action ;(2) but the person who comes into possession will not be liable in this action for the antecedent occupation of the person from whom he received the premises ; and therefore where assignees of a bankrupt took possession in the middle of the year, of premises occupied by him, and continued for some time in possession, it was held that they could only be charged for that portion of time during which they themselves had occupied.(3)* If the

Vide Post Titles, *Landlord and Tenant*, Ch. IX. sec. III. *Messe Profits*, Ch. X.

An action of *assumpsit* for the use and occupation of lands, is not local, being founded on a privity of contract, and not privity of estate. *Corporation of New York v. Dawson*, 2 Johns. Cas. 335.—AM. Ed.

* The bankrupt in this case would, before the late Act of Parliament, have been liable to an action of *assumpsit* for the whole rent, for his contract, being to pay during the truce, is executory and not discharged by the certificate. *Boot v. Wilson and another*, 8 East, 311. So he would also have been liable to an action of covenant on a lease, notwithstanding his certificate. *Mills v. Auriol*, 1 H. Black. 433. 4 T. Rep. 24. But debt would not lie against the original lessee for rent accruing after his bankruptcy, and after the assignee took possession under the commissioner's assignment. *Wadham v. Marlow*, 8 East, 314, note. Now, however, it is provided, that where a commission of bankruptcy shall be sued forth against any person who shall be entitled to any lease, or agreement for a lease, and the assignee shall accept the same, and the benefit therefrom as part of the bankrupt's estate and effects, the bankrupt shall not be, or be deemed to be liable to pay the rent accruing, due after such acceptance of the same as aforesaid ; and after such acceptance the bankrupt shall not be liable to the conditions, covenants, or agreements therein contained ; provided that in all such cases it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators or assigns, if the assignees shall decline, upon their being required so to do, to determine whether they will or will not so accept such lease or agreement for a lease, to apply by petition to the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, praying that they may either so accept the same, or deliver up the lease or agreement for the lease, and the possession of the premises demised, or intended to be demised, who shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and which shall be binding on all parties. Stat. 49 Geo. 3, c. 121, s. 19. On this Statute it has been holden, that if the assignee of a lease become bankrupt, and his assignees refuse to accept the lease, the bankrupt still remains liable on his privity of estate. *Copeland v. Stephens*, 1 B. & A. 593.

owner of an estate let it to a tenant from year to year, and then grant an annuity chargeable upon it, and the grantee afterwards bring an ejectment, and recover judgment; he may then maintain this action against the tenant, and recover all rent remaining in his hands previous to the day of the demise in the ejectment, for the tenant virtually held under him; but he cannot recover for any rent due subsequent to the day of the demise, for he is not permitted to act so inconsistently as to treat the lessee as a tenant and trespasser during the same period of time.

Ch. II. s. 2.
Action for use
and occu-
pation.

Birch v.
Wright, 1 T.
Rep. 378.

Hanson v.
Tomlin,

Peakes' Cas.
193.

In proof of the occupation, it should appear that such occupation has been, as far as depended on the plaintiff, beneficial to the defendant.^(o) Therefore where the plaintiff, representing himself to have a longer term than he really had, agreed with the defendant to assign such term to him, and the defendant thereupon took possession, which possession was injurious rather than beneficial to him, by reason of the plaintiff having a shorter term in the premises; Lord KENYON held the seller could not, on the purchaser rescinding the contract, and delivering back the premises, maintain this action for the time he was in possession. Indeed in one case,⁽¹⁾ the Court of Common Pleas seems to have been of opinion, that in no case where a purchase went off on account of a defect of title, could the seller maintain this species of action for the use which the defendant had of the premises during the time he was in possession. They did not however decide the case on that ground, but proceeded on the idea of the interest of the money which the purchaser had paid, being a sufficient compensation for the use which he had of the premises. But in a subsequent case,⁽²⁾ the Court of Ex-

(1) Kirtland
v. Pounsett,
2 Taunt. 145.

(2) Hall v.
Vaughan, 6
Price, 169.

(o) Any interruption in the enjoyment of the premises, will suspend the rent, *Vaughan et al. v. Blumhard et al.* 4 Dall. Rep. 194. S. C. 1 Yeates' Rep. 175.

Where by mistake, the vendor of a tract of land, delivers to the vendee possession of other land, which does not belong to him, and the vendee is evicted from such other land; he is not to be compelled to pay rent to the vendor for the time, he remained in possession thereof; although he continue to hold the full quantity, which he bought by metes and bounds. *Nelson v. Suddarth*, 1 Hen. & Munf. Rep. 350.

Under what circumstances a subsequent lease made by the landlord, of the demised premises in the occupation of the assignee of a residue of the term, will not be deemed an eviction of the lessee, nor bar the landlord of recovering of him a balance due for rent on the original contract. *Cooke v. Wise*, 3 Hen. & Munf. Rep. 463.

If the tenant have enjoyed the land, he cannot repel his landlord's claim for rent by saying he had nothing on the land, or that the conveyance was void. *Wulson et al. v. Alexander*, 1 Wash. Rep. 440.

It is a principle of law, that when the right to land, and the right to rent issuing out of it, are united in the same person, the rent is extinct. *Phillips v. Bensall*, 2 Binn. Rep. 138. S. C. 3 Yeates' Rep. 194.—AM. ED.

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and occu-
pation

chequer held, that the vendor might, where the contract had gone off without fault on his part, and the occupation had been beneficial to the purchaser, maintain an action for use and occupation; observing, that title was not necessary to support it, the declaration only alleging an occupation by the permission of the plaintiff; and such also appears at first to have been the opinion of MANSFIELD, Chief Justice, in *Kirlland v. Pounsett*.

(1) *Brewer v. Palmer*, 4 Esp. 213.

If the agreement be in writing, (1) it must be produced, the plaintiff cannot, in such a case, go upon the bare occupation, for where there is an actual contract none can be implied. It is

(2) *Vide Doe dem. Wood v. Morris*, 12 East. 237.

true that in an ejectment, (2) where the plaintiff's witness having proved payment of rent, said, on cross-examination, that an agreement in writing relative to the lands in question, (3) had been produced on a former trial between the parties, but he did not know the contents of it, and another witness proved that he had seen such agreement in the hands of the plaintiff's attorney that morning; yet, as no notice had been given by the defendant to produce this agreement, the Court held this general evidence not sufficient to exclude the parol evidence of payment of rent, or to rebut the inference of a tenancy from year to year arising from it; but this case would hardly apply to the action for use and occupation, where the exact rent must be proved.

(3) *Law v. Wills, Peake's Cas.* 128, acc.

What instrument is deemed an agreement and what a lease.

If the written contract amount to a present demise, an *agreement* stamp is not sufficient, but a *lease* stamp should be impressed; (4) and therefore questions frequently arise upon the construction of agreements between landlord and tenant, whether they are to be considered as agreements only for a future lease, or as amounting themselves to an actual demise. As a general rule it may be laid down, that when the clear intention of the parties appears to be that a more formal instrument shall be prepared between them, and that the agreement produced is merely to ascertain the terms of such future instrument, the agreement shall be considered as executory only, and not as conveying any legal interest; and on the other hand, that when the agreement purports to be a final settlement of their rights, it shall be deemed a lease, however informally it may be drawn up: and even in the case of an agreement for a future lease, if such agreement expressly provide that it shall operate as a lease until the more formal lease shall be prepared and executed, it shall have the same effect. Thus a paper writing, (5) containing words of present demise, with an agreement that the lessee shall take possession immediately, and that a lease shall be executed at a future time, but making no further provision for the intermediate

(4) *Vide Goodtitle dem. Estwicke v. Way*, 1 T. Rep. 735.

(5) *Ibid.*

holding, is only an agreement for a lease. So an instrument, reciting that *A.* had agreed that in case he should be entitled to certain copyhold premises on the death of *B.* he would immediately demise the same to *C.* and declaring that he did thereby agree to let and demise the same to him, and promise to procure the license of the Lord, was also determined to be no demise.⁽¹⁾ Many other cases⁽²⁾ have occurred to the same effect:

but in *Poole v. Bentley*,⁽³⁾ which arose on an instrument whereby *A.* agreed to let, and *B.* agreed to take certain land for sixty-one years at a certain rent for building, and the tenant agreed to lay out 2,000*l.* within four years, in building five or more houses; and when five houses were covered in, the landlord agreed to grant a lease or leases, but the agreement was to be considered binding, till one more fully prepared could be produced: the Court considered the latter words as shewing that the future and more formal instrument was merely for further assurance, and that the agreement itself in the meantime amounted to a complete and actual demise.

In cases where the quantum of rent has not been fixed upon by the parties, the plaintiff, in addition to the evidence above stated, should be prepared to prove the annual value of the premises during the time of the defendant's occupation.^(p)

The defendant who has so occupied by the permission of the plaintiff, will not be suffered to dispute his title by shewing that he had no legal estate or power to demise, as that he had been simoniacally presented to the living, the glebe of which the defendant had occupied as his tenant,⁽⁴⁾ or that he had previously demised to another person, whose term had not expired when the defendant by his consent entered into possession.⁽⁵⁾ But though the defendant is precluded from disputing his landlord's title to demise, he is at liberty to shew that the plaintiff had only a temporary interest at the time of the demise, which has since expired:⁽⁶⁾ or that he has subsequently mortgaged⁽⁷⁾ the estate to another person, who has given the defendant notice to pay his rent to him; or that the tenancy has been determined either by a regular notice to quit on the one side or the other,⁽⁸⁾ or an actual delivery up of possession by the defendant to the plaintiff, and an acceptance by him.⁽⁹⁾ To prove these facts he must be prepared with the regular evidence to shew what the plaintiff's title originally was, or the deeds by which he has parted with

Ch. II. s. 2.
What instrument is deemed an agreement and what a lease.

(1) *Doe dem. Coore v. Clare*, 2 T. R. p. 739.
See also *Fenny dem. Eastham v. Child*, 2 M. & S. 255.

(2) *Roe dem. Jackson v. Ashburner*, 5 T. Rep. 163.
Doe dem. Dowling v. Bissel, 3 Taunt. 65.
Tempest v. Rawling, 13 East, 18.
Doe dem. Bromfield v. Smith, 6 East, 530.

(3) 12 East, 168.

(4) *Cooke v. Loxley*, ante, 45.

(5) *Phillips v. Scutthorpe*, 1 B. & A. 30.

(6) *Morgan v. Ambrose*, ante, 255.
England dem. Symborn v. Slade, 4 T. Rep. 682.

(7) *Holmes v. Pontin*, *Peake's Cas.* 99.

(8) *Redpath v. Roberts*, 3 Esp. Cas. 225.

(9) *Whitehead v. Clifford*, 5 Taunt. 518.

(p) Vide *Smith v. The Sheriff of Charleston District*, 1 Bay's Rep. 443. *Abbot et al. v. Rauchiff*, 15 Johns. Rep. 505.—Am. Ed.

Part. II.
Action for
mismanage-
ment of Farm.

it, or the notice given, for the mere fact of the defendant having once been tenant is sufficient to establish the plaintiff's case.

Evidence in action for mismanagement of farm.

THE action against a tenant for not properly managing a farm, will require but few observations. If the misconduct consist in the breach of an actual agreement, the agreement and breach of it must be regularly proved; and here it may be observed, that an agreement to take a farm on certain terms, to be made the subject of covenant in a future lease, will, after entry and payment of rent, be considered as so far creating a tenancy as to warrant a declaration stating that the plaintiff had demised to the defendant.(1) If nothing was said about the terms of holding at the time of the demise, (in which case the law implies a promise to manage according to the course of good husbandry in the country),(2) the evidence ought to shew what that course is, and how the defendant has deviated from it. Thus, if a landlord sue his tenant for taking the hay and straw from off the land, and selling or consuming it elsewhere, the landlord must prove that by the course of husbandry in the neighbourhood, the hay and straw ought to be consumed on the farm: for as to this there is no general rule, some countries growing hay, &c. for the mere purpose of being sold.(3) But if the tenant take away the dung which arises on the farm, cut down trees which grow upon it, or plough up the meadow land, the landlord will not be obliged to prove this to be contrary to the custom of the country; it being contrary to the rights of a landlord, as settled by the general rules of law which govern every part of the kingdom.(4)

(1) *Tempest v. Rawling*, 13 East, 18.

(2) *Powley v. Walker*, 5 T. Rep. 373.

(3) *Leigh v. Hewit*, 4 East, 154.

(4) *Forber v. Andrews*, cor. Buller, J. Winton. Sum. Ass. 1788; *Gough v. Howard*, cor. Lawrence, J. Salop, Sum. Ass. 1801.

2 Geo. 2. c. 23.

Evidence in an action on an attorney's bill.

THE action by an attorney for his bill differs from all others on contract, in this, that where the cause of action is for business done in the course of a legal proceeding, it is necessary by the positive directions of an Act of Parliament, that the plaintiff should deliver a bill, signed by himself, a month previous to the commencement of his action.(q) It will be incumbent on him

(q) In *Pennsylvania*, an action cannot be supported by an attorney, or counsellor at law, against his client, for advice and services in the trial of a cause, over and above the attorney's fees allowed by Act of Assembly. *Moony v. Lloyd*, 5 Serg. & R. Rep. 412.

therefore, to prove this fact before he can be permitted to proceed; and to enable him to do this, he should either produce a copy of the bill delivered, also signed by himself, or else give notice to the defendant to produce the one which was delivered. (1) It must also be proved that the bill was left with the defendant, or at his place of abode, for the mere delivery of it into his hands, if he return it immediately, is not sufficient, though he promise to pay the money. (2) So it was ruled by Lord Eldon at *Nisi Prius*, that a delivery at the counting-house of the defendant, who dwelt elsewhere, was not sufficient. (3) But if two persons employ an attorney, and one of them gives all directions and orders about the business, a delivery to the person so acting is sufficient to charge both. (4) as is a delivery to an attorney appointed by the defendant to succeed the plaintiff in the conduct of a suit. (5)

This Act of Parliament has always received a liberal construction in favour of the client. If any part of the bill be for business done in a Court of Justice, it is within the Statute; the charge for an affidavit of debt, engrossed and sworn, though no writ was actually sued out, (6) or for a *dedimus potestatem*, in a bill in other respects entirely for conveyancing, (7) has been held to be sufficient for this purpose; and though all the business were at the *Quarter Sessions*, (8) or on obtaining a bankrupt's certificate, (9) or the attorney charged nothing but what he actually expended, (10)* it is still necessary to prove the bill delivered before he can maintain his action. But where no business has been done in Court, as where an affidavit and bond to the chancellor were prepared with a view to a commission of bankruptcy, but the affidavit was never sworn; (11) or where the whole of the demand is for *conveyancing*, it is not necessary to deliver any bill; neither is it necessary where the action is brought by one attorney against another, though all the business were done before the defendant became an attorney. (12) So where an agent to a country attorney brings an action against his principal; (13) or the executor or administrator of an attorney brings an action for business done by the deceased; (14) it is not necessary for the

Ch. II. s. 2.
Action on an
attorney's bill.

(1) Vide Anderson v. May, ante, 159.

(2) Brooks v. Mason, 1 H. Black. 290.

(3) Hill v. Humphreys, 4 Esp. 254.

(4) Finchet v. How, 2 Campb. 377.

(5) Vincent v. Staymaker, 12 East, 372.

(6) Winter v. Payne, 6 T. Rep. 645.

(7) Ex parte Prickett, 1 Bos & Pul. N. R. 266.

(8) Clarke v. Donovan, 5 T. Rep. 694.

(9) Collins v. Nicholson, 2 Taunt. 321.

(10) Miller v. Towers, Peake's Cas. 102.

(11) Barton v. Chatterton, 3 B. & A. 486.

(12) Ford v. Maxwell, 2 H. Black. 589.

(13) Bridges v. Francis, Peak. Cas. 1.

(14) Griffith v. Squire, Peake's Cas. 145.

Prac. 58, and Bul. N. P. 145.

But if a client give a note or obligation, it is lawful for counsel to accept it, and in case of non-payment, an action may be supported on it. *ibid.*—AM. Ed.

* This must be understood where the whole bill is for business in some manner connected with the plaintiff's profession, for if he lay out a sum of money for another, merely as a friend, and give an account of it in his bill, he will not be precluded from recovering that as money paid to the defendant's use. *Newbrey v. Fleming*, 11 East, 385.

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Action on an
attorney's bill.

(1) *Martin v*
Winder, cited
Doug. 199.

(2) *Williams*
v. Frith,
Doug. 198.

plaintiff, in either of these cases, to prove the formal delivery of a bill according to the Statute; and if an attorney himself be defendant, he may *set off* (1) his demand without delivering a bill, in which case, however, he should deliver his bill time enough to enable the plaintiff to get it taxed before the trial.

The plaintiff, in cases within the Statute, must also give general evidence of the business having been done; and prove his retainer, either by direct evidence of that fact, or at least by the circumstance of the defendant from time to time appearing as a party, and giving directions about the cause. (2) (r) The quantum or reasonableness of the bill is never entered into at *Nisi Prius*; but if the defendant mean to dispute that, he must obtain an order to tax the bill before the master. Bills for conveyancing, and other business not within the Statute, are open to discussion at *Nisi Prius*; and, therefore, in these cases the plaintiff must not only prove his retainer and the business done, but also the reasonableness of the charges.

SECTION III.

Of the evidence on behalf of the defendant, and the plaintiff's evidence on particular pleas.

On the General Issue.

Ch. II. s. 3.
Want of con-
sideration.

THE pleas to which the defendant is entitled in this action are as various as the different transactions of mankind; but many things which were formerly pleaded, may now be taken advantage of, on the general issue, *non assumpsit*. By that plea the defendant puts the plaintiff on proving the whole of his case, and entitles himself to give in evidence any thing which shews that no debt was due at the time the action was commenced, whether on account of the promise being originally void for the want of a good and legal consideration, or by reason of the demand having been since satisfied. (s)

(r) In an action by an attorney for his costs, although the original retainer need not be proved, yet some recognition of the attorney in the progress of the suit, ought to be shewn to make the party liable for costs. *Hotchkiss v. Le Roy et al.* 9 Johns. Rep. 142.—AM. ED.

Illegal contracts.

(s) In *Massachusetts*, the rule of *melior est conditio defendentis*, where the par-

If the plaintiff's demand be compounded of skill and materials, and he has grossly misconducted himself, as where an apothecary, Ch. II. s. 3. Want of consideration.

ties are equally guilty or equally innocent, has been recognised. *Gates et al. v. Winslow et al.* 1 Mass. Rep. 65.

Where a Sheriff having it in his power to arrest a person forbears to do so on the promise of the defendant in writing to deliver him up, who receives an indemnity for such promise, and the person is not delivered up agreeably to promise, it is held that the undertaking is void, and the Sheriff can maintain no suit thereon, nor for the money paid the defendant as an indemnity. *Denny v. Lincoln*, 5 Mass. Rep. 385. *Churchill v. Perkins et al.* 5 Do. 541.

At common law, every security given for the payment of money, the payment of which is prohibited by Statute, is void as between the parties to it. *Farrar admr. v. Barton et al.* *ibid.* 395. *Seidenbender v. Charles' admrs.* 4 Serg. & R. Rep. 159.

Contracts in restraint of trade and business, are in general void, as against the policy of the law. *Pierce v. Fuller*, 8 Mass. Rep. 223. *Perkins et al. v. Lyman*, 9 Do. 522.

A sale of lands, out of the possession of the vendor, and held by an adverse title, is an illegal consideration, and will not support an action. *Whitaker v. Cone*, 2 Johns. Cas. 58. *Belding v. Pitkin*, 2 Caines' Rep. 147.

A penalty inflicted by Statute upon an offense, implies a prohibition of it, so as to make a contract relating to it void. *Mitchell v. Smith*, 1 Binn. Rep. 110. *S. C.* 4 Yeates' Rep. 24. 4 Dall. Rep. 269.

An action cannot be maintained in the Courts of this State, on a contract in violation of the laws of the United States, or of Pennsylvania. *Maybin v. Coulon*, 4 Dall. Rep. 298. *S. C.* 4 Yeates' Rep. 24. *Duncanson v. M. Chure*, 4 Dall. Rep. 308. *Murgatroyd v. M. Chure*, *ibid.* 342. *Biddis v. James*, 6 Binn. Rep. 321. *Seidenbender v. Charles' admr.* 4 Serg. & R. Rep. 159.

In Vermont, an action will not lie to recover back money paid, or chattels advanced upon a contract *malum in se*. *Barnard v. Crane*, 1 Tyl. Rep. 457.

In Connecticut, a note given for a consideration which is against law is void. *Ketchum v. Scribner*, 1 Root's Rep. 95.

So in an action of *book debt*, the Court said they would give no aid to any parties in an illicit transaction. *Lockwood v. Knap*, *ibid.* 153.

In New York, it was brought in one case into view, but not decided whether their Courts will entertain a plea that a contract is illegal because in contravention of the royal instructions respecting grants of lands to patentees. *Le Roy et al. v. Servis et al.* 1 N. York Cas. in Er. iii.

A contract with a branch pilot of the port of New York, for a certain sum, to assist a vessel in distress, is absolutely void, and will not sustain an action. *Callagan et al. v. Ballett et al.* 1 Caines' Rep. 104.

An action will not lie upon a contract to pay over half the proceeds of an illegal contract, though the money arising from it have been received by the defendant. *Belding v. Pitkin*, 2 Caines' Rep. 147.

Selling a pretended title is in law maintenance, and both parties being in *pari delicto*, a Court of Equity will not relieve either. *Woodworth et al. v. Jones et al.* 2 Johns. Cas. 417.

But it seems that a note given for a pretended title, is not void in the hands of an endorsee. *Baker et al. v. Arnold*, 3 Caines' Rep. 279.

A promise by the defendant to pay the plaintiff the costs of a suit, which they had settled in consideration that the plaintiff would not oppose his discharge under the insolvent law, is illegal and void. *Waite v. Harper*, 2 Johns. Rep. 386.

No action can be maintained on a contract made for the sale of tickets in a lottery

Kannan v. M'Mullen,
Prake's N. P.
Cas. 59.

Part II. cary, giving medicines on his own judgment, and not under the
Want of con- directions of a physician, appears to have been grossly negligent
sideration.

carried on contrary to law. *Hunt et al. v. Knickerbocker*, 5 *Johns. Rep.* 337. *Primer v. Mc Connell*, cited 6 *Binn. Rep.* 890. *Barton v. Hughes et al.* 2 *Browne's Rep.* 48. *Seidenbender, v. Charles' admr. & Serg. & R. Rep.* 151. Nor for the amount of a prize drawn to a ticket purchased after the time limited by law for completing the sales. *Biddis v. James*, 6 *Binn. Rep.* 331.

But in *Virginia*, where a transaction between a debtor and his creditor is intended by them both to defraud the other creditors of the debtor, but the debtor under all the circumstances of the case is not so culpable as the creditor, it would seem that a Court of Equity ought not altogether to refuse relief to the debtor, but to proportion the relief granted to the degrees of criminality in both parties, so as on the one hand to avoid the encouragement of fraud, and on the other to prevent extortion and oppression. *Austin v. Winston*, 1 *Hen. & Munf. Rep.* 32.

The Courts of the *United States* will not enforce an agreement entered into in fraud of a law of the *United States*, though that agreement were made between persons who were then enemies of the *United States*, and the object of agreement a mere stratagem of war. *Hannay v. Bee*, 3 *Cranch's Rep.* 242.

Nudum pactum.

In *Vermont*, a promissory note, deposited with arbitrators, subject to their endorsement to the amount of their award, is void for want of consideration. *Drake v. Collins*, 1 *Tyl. Rep.* 79.

If a credit given be voluntary subsequent to and forming no part of the original contract, it may be retracted. *Fisher v. Brown. ibid.* 387.

Forbearance is a good consideration of a promise to bind the promiser in a note to pay the assignee, notwithstanding a discharge from the promisee who is a bankrupt. *Tuttle v. Bigelow*, 1 *Root's Rep.* 108.

An off-set, which is compellable only in Chancery, is good consideration of an agreement to pay interest. *Punderson v. Fanning, ibid.* 193.

A written contract without a consideration is not valid. *Borner v. Hollenbeck*, 2 *Doy's Rep.* 22.

In an action of assumpsit on mutual promises, they must be laid in the declaration as concurrent : and if stated to be "afterwards, to wit, on the same day," it is bad, and the promise a *nudum pactum*. *Livingston v. Rogers*, 1 *Caines' Rep.* 583. *Coleman & Caines' Cas.* 331. *Bicks v. Burhans et al.* 10 *Johns. Rep.* 243.

The withdrawal of a note, from the Bank, deposited there for collection, is a sufficient consideration to support an assumpsit against a third person, even though the note be afterwards protested for non-payment. *Stewart v. Eden*, 2 *Caines' Rep.* 150.

A parol gift is not binding until delivery of possession be given. *Noble v. Smith et al.* 2 *Johns. Rep.* 52. *S. P. Pearson v. Pearson*, 7 *Johns. Rep.* 26. *Grangiac v. Arden*, 10 *Do.* 293.

A promise by a constable to a defendant, against whom he has an execution, that if the defendant will deliver property as security, he will not sell it under thirty days, is void, having no consideration. *Goodale v. Holbridge*, 2 *Johns. Rep.* 193.

A promise to pay damages for the detention of a certain sum of money beyond the amount detained, is a *nudum pactum*. *Phetteplace v. Storee, ibid.* 448.

If the consideration on which a promise is founded, be neither for the benefit of the defendant, nor the trouble nor prejudice of the plaintiff, it is without consideration. *Powell v. Brown*, 3 *Johns. Rep.* 100. *Miller v. Drake*, 1 *Caines' Rep.* 45.

or ignorant, this fact furnishes a defence on the general issue. **Ch. II. s. 2.**
 So in the case before alluded to, if a portrait be not a likeness, **Want of consideration.**

Where, on a return of *non est inventus* on the *ca. sa.* against the principal in a suit, the bail gave a note for the amount of the judgment, which was afterwards reversed on a writ of error, it was held as the bail was not fixed and the judgment reversed there was no consideration for the note, and the plaintiff was not entitled to recover on the same. *Tappen v. Van Wagenen*, 3 Johns. Rep. 458.

Where *A.* and *B.* were joint owners of a vessel, and *A.* voluntarily undertook to get the vessel insured, but neglected to do so, it was held no action would lie for the non-performance of his promise, though *B.* sustained a damage by the nonfeasance, there being no consideration for the promise; *aliter*, if a factor or agent who would be entitled to a commission. *Thorne et al. v. Deus*, 4 Johns. Rep. 84.

In an action on a written agreement to give the plaintiff the refusal of a farm, it was held necessary to shew a consideration for the promise. *Burnet v. Blasco*, *ibid.* 235.

A sufficient consideration is necessary in a written agreement as if it remained in *parol. ibid.* *S. P. The People v. Howell*, *ibid.* 296.

A forbearance to sue, generally is a good consideration for a promise to pay the debt of another. *Elting et al. v. Vanderlyn*, *ibid.* 237.

Provided he has a legal cause of action. *Hamaker v. Eberley*, 2 Binn. Rep. 509.

If a father holds the legal title of land in trust for his son, and they agree to sell the land, and the father receives the purchase money, and promises to pay the debts of his son, a creditor of the son who had previously obtained judgment against the son, and levied on the land, may sustain *assumpsit* for money had and received against the father. *Fleming v. Alter*, 7 Serg. & R. Rep. 295.

Payment of part of a debt by a debtor is not a consideration which will support a promise to forbear to sue. *Pabadie v. King*, 12 Johns. Rep. 426.

In an action brought against one for the guaranty of the performance of an agreement by another, the declaration must state a sufficient consideration for the guaranty. *Bailey et al. v. Freeman*, 4 Johns. Rep. 280.

The plaintiff entered on the land of the defendant, without his knowledge or authority, cleared it and improved it; the defendant agreed with the plaintiff, against whom he had brought an ejectment, that he would sell the plaintiff the land as wild land, or pay him for the improvements; such a promise to pay for the improvements was a *nudum pactum*, on which no action could be maintained, there being in the owner, neither a legal nor a moral obligation to pay for the same. *Frear v. Hardenberg*, 5 Johns. Rep. 272.

Where two persons made an agreement at an auction not to bid against each other, but that *A.* one of them should buy and divide the articles between them; he made the purchase, but refused to divide, and on an action being brought against *A.* the agreement was held to be void, without consideration, and against public policy. *Doolin v. Ward*, 6 Johns. Rep. 194. *Wilbur v. How*, 8 Johns. Rep. 346.

Where the promise of one party is the consideration of the promise of the other, the promises must be concurrent and obligatory on both parties at the same time. *Tucker v. Woods*, 12 Johns. Rep. 190.

A moral or equitable obligation is a sufficient consideration for an *assumpsit*. *Clark et al. v. Herring*, 5 Binn. Rep. 33.

Quere, Whether on an implied *assumpsit*. *Overseers of Tioga v. Overseers of Seneca*, 13 Johns. Rep. 380.

A mere promise by the defendant to the plaintiff, to pay him a sum due by the son of the defendant, was held to be void for want of consideration. *Pease v. Alexander*, 7 Johns. Rep. 25. *S. P. Pearson v. Pearson*, *ibid.* 26.

Part II. the failure of skill takes away all title to payment.(1) But, in
Want of con- general, the circumstance of work or materials not being so good
sideration.

(1) Grimaldi v. White, 4 Esp. Cas. 95. The debt of a person, discharged under the insolvent Act, is due in conscience, and is a sufficient consideration for a new promise to pay the debt. *Scouten v. Eiland*, *ibid.* 36. *Maxim v. Morse*, 8 *Mass. Rep.* 127.

Where a promise is laid, to be founded on a *past* consideration, it must be stated to have been done on the *request* of the party promising, or at least it must appear that he was under a *moral* obligation to do or procure the act to be done. *Comstock v. Smith*, 7 *Johns. Rep.* 87.

A past consideration beneficial to the defendant, to which he afterwards assents, is sufficient to support an action. *Doty v. Wilson*, 14 *Do.* 373.

If a consideration be illegal, it will not support an *assumpsit*. *Coventry v. Barton*, 17 *Johns. Rep.* 142. Et vide *Fales v. Mayberry*, 2 *Gallis. Rep.* 560.

If a person through a mis-apprehension of the law promise to pay money, from the payment of which he is discharged by law, or acknowledge himself under an obligation which the law will not impose on him, he shall not be bound by such acknowledgment or promise. *Warder et al. v. Tucker*, 7 *Mass. Rep.* 449. *Freeman et al. v. Boynton*, *ibid.* 483. *Pearson v. Lord*, 6 *Do.* 81. *May v. Coffin*, 4 *Do.* 341. *Garlund v. The Salem Bank*, 9 *Do.* 408. Vide *Levy v. U. States Bank*, 4 *Dall. Rep.* 234. *S. C.* 1 *Binn. Rep.* 37.

Where one at the direction of another, as his servant, entered a field upon a promise of indemnity; such a promise was held to be grounded on a sufficient consideration. *Allaire v. Ouland*, 2 *Johns. Cas.* 52. Sed vide *Coventry v. Barton*, 17 *Johns. Rep.* 142.

There must be some collateral matter, some injury to the plaintiff, or benefit to the defendant, in the consideration laid as the ground of the *assumpsit*. *Waters v. Millar*, 1 *Dall. Rep.* 369.

If two persons claim a tract of land by different titles, and one purchase from the other, without fraud, the settlement of the dispute, is a good consideration to support the contract, though the title purchased be bad. *Cavode et al. v. McKelvey*, *Addis. Rep.* 56.

A promise, by the defendant, to the plaintiff, to give the plaintiff a marriage portion, if he would marry defendant's niece, is founded on a good consideration, and valid. *Barr v. Hill*, *ibid.* 376.

The smallest spark of benefit or accommodation, will be sufficient to create a valid consideration for a promise. *Austyn v. M^r Lure*, 4 *Dall. Rep.* 226.

An agreement by a surety to forbear a suit against his principal, after he shall have paid the debt of his principal, is a good consideration to support a promise though at the time of the agreement, the surety had no cause of action against his principal. *Hamaker v. Eberley*, 2 *Binn. Rep.* 506. *Johnes v. Potter*, 5 *Serg. & R. Rep.* 519.

Taking and surrendering a person on a bail piece, for whom the plaintiff was bail, in consequence of which the defendant also surrendered him in a suit in which he was bail, is a good consideration to support a promise by the defendant after the surrender, to pay a proportion of the expense attending it. *Greeves v. M^r Callister*, 1 *Browne's Rep.* 109. *S. C.* 2 *Binn. Rep.* 591.

Where the defendant requested *A.* to pay money to *B.* for the use of the defendant, out of money of the plaintiff, or of others which was expected to be in his hands, and *A.* did pay the money of the plaintiff accordingly, the law raises an *assumpsit*. *Brown v. Campbell*, 1 *Serg. & R. Rep.* 176.

Wherever a consideration, which is the foundation of a promise, produces benefit to the one party, or injury to the other, it will be sufficient to support an *assumpsit*. *Carr v. Gooch*, 1 *Wash. Rep.* 335. Vide *Field's exr. v. Spotswood*, *ibid.* 362. *Scott's exr. v. Osborne's exr.* 2 *Mumf. Rep.* 413.

as contracted for by the plaintiff, where the defendant has received *some* benefit, does not furnish any defence to the action; Ch II. s. 3.
Want of consideration.

A declaration, stating that the defendant undertook to conduct a suit, and mismanaged it, implies that he was therefore to receive a compensation, and it is not competent to him to aver a want of consideration. *Stephens v. White*, 2 Wash. Rep. 260.

An executor writes to his testator's creditor, that as soon as he can dispose of his crops, he will pay the claim, or will let him have any property in his possession, at a fair valuation, this promise will not bind the executor in his own right, without an averment of assets, a forbearance to sue or some other consideration. *Tuliaferro v. Robb*, 2 Cull's Rep. 258.

If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed, the appellant will pay him the full amount of the debt, damages and costs then due on the appeal, and the appellee consents thereto, it will be a sufficient consideration for a promise, on which to found an action. *Spottwood v. Pendleton*, *ibid* 209.

A note in writing, to pay the debts of another, without a consideration is void. *Chandler v. Neale*, 2 Hen. & Munf. Rep. 124.

A parol promise, by a father to his daughter's husband, before the marriage, is a sufficient consideration to sustain a written agreement, made after the marriage, if such written agreement be otherwise sufficient. *Argenbright v. Campbell et ux*. 3 Hen. & Munf. Rep. 144.

A general acceptance of an order, binds the acceptor to the payee, by whom the same was taken, for a *bona fide* consideration; notwithstanding the consideration which induced the acceptance, afterwards fails without any fault on the part of the payee. *Corbin's admr. v. Southgate*, *ibid* 319. Vide 1 Cranch's Rep. 443, appendix.

A letter from the defendant, to a third person, saying, they would be his sureties for 130 barrels of corn, payable in 12 months, will maintain an action of *assumpsit* against the defendants by any person, who, on the faith of that letter, shall have given credit to the third person. *Laverson v. Mason*, 3 Do. 492.

A promise by a merchant's factor, that he would write to his principal to get insurance done, does not bind the principal to insure. *Randolph v. Ware*, *ibid* 503.

A promise by an attorney to his client, if the client were non-suited, he, the attorney would pay the costs, is, without consideration, and void. *Mitchell v. Bell*, Rep. in Co. of Conf. 17. Tayl. Rep. 61.

An executor is under a moral obligation to pay, when he has assets, and if he promise, in consideration of *forbearance* to pay, he will be bound though there be no assets. *McNeil v. Quince*, 2 Hayw. Rep. 153.

In an action of *assumpsit*, the declaration must set forth a *sufficient consideration*, and a promise to pay, or it is fatal, and not cured by the Statute of Jeofails. *Bruner v. Stout*, Hardin. Rep. 252.

As to the force of a voluntary promise of emancipation to a slave, by his master. Vide *Beall v. Joseph*, *ibid* 51.

So a note given for a consideration, which has failed, cannot be enforced. *Brown v. Fort*, Martin's Ori. T. R. 34.

But a COVENANT of itself imports a consideration. *Livingston v. Tremper*, 4 Johns. Rep. 416.

Quere, In an assignment of a leasehold interest under seal, is any consideration necessary. *Shepherd v. Little*, 14 Do. 210.

Where the defendant has, without objection at the time, accepted articles manufactured for him, he is not entitled, in an action brought against him for the price of the articles, to shew in evidence that the workmanship was bad; but his remedy

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sideration.

but the defendant must seek his remedy by a cross action against the plaintiff for not fulfilling his contract.*

would be by a special action on the case for fraud and deceit in the workmanship. *Everett v. Gray et al.* 1 Mass. Rep. 101.

If a tradesman, having contracted to perform a certain undertaking, voluntarily leaves it unfinished, he can have no action against his employer for the part performed. *Faxon v. Mansfield et al.* 2 Mass. Rep. 147.

But if the defendants agreed to build a vessel by a certain time, and the plaintiffs to find iron, if the iron be not provided in time, the defendants are excused from not completing it in time. *Bulkley v. Brainard*, 3 Root's Rep. 5.

In an action for goods sold and delivered, the defendant cannot give evidence, by way of set off, that certain goods, which had been bought by the defendant, and consigned by the vendor to the plaintiff, for the defendant were detained by the plaintiff, and consigned by him to other persons. *Gogel v. Jacoby*, 5 Serg. & R. Rep. 117.

But the defendant may give evidence of acts of *malfaisance* or *non faisance*, by the plaintiff, and immediately connected with the plaintiff's cause of action, such evidence not being admitted by way of defalcation, but for the purpose of defeating in whole, or in part, the plaintiff's cause of action. *ibid.*

The parties are entitled to rescind a contract, only in the event of a total departure from it. *Phillips v. Bruce*, 1 Anth. N. P. Cas. 65.

Inadequate performance may be given in evidence upon an *executory*, but not upon an *executed* contract. *ibid.*

A contract may be avoided by the representatives of a party thereto, on the ground of his having been drunk when it was made, though such drunkenness was not occasioned by the procurement of the other party. *Wiggleworth v. Steers*, 1 Hen. & Munf. Rep. 70.

A Court of Equity will annul a contract which the defendant has failed to perform, and cannot perform on his part. *Skillem's exrs. v. May's exrs.* 4 Cranch's Rep. 137.

In an action of *assumpsit*, under the general issue, duress, fraud, and imposition may be given in evidence under the general issue. *Candy v. Twichel*, 3 Root's Rep. 123.

But under such a plea to an express promise, neither performance nor any act of the plaintiff can be given in evidence. *Bement v. Peck*, *ibid.* 494.

In this action, if usury be specially pleaded, and the Court reject the evidence offered under such special plea, it may be admitted upon the general plea. *Levy v. Gadsby*, 3 Cranch's Rep. 180. Vide *Wycaff v. Longhead*, 2 Dall. Rep. 92.

In *assumpsit* for the amount of a note given for the price of land, defect of title or of the quantity of land, may be given in evidence in avoidance of the note. *Sumter v. Welsh*, 2 Bay's Rep. 558.—AN EN.

* The practice of different Judges on this subject has not been by any means uniform. Lord MANSFIELD is said to have held, that in no case could the improper performance of the work be made the subject of inquiry in an action for the performance of it; and Mr. J. BULLER, in a case of *Broom v. Davis*, *Tunst. Lent. Ass.* 1794, determined, that where a booth had been built for a stipulated price, the ill construction of it afforded no defence to an action for work and labour. In the case of *Grimaldi v. White*, above mentioned, where the defendant had it in his power to return the portrait, Lord KENYON held the same doctrine: but in that of *Kannen v. M'Mullen*, and in several others cited in 7 East, 480, his Lordship held, that where, from the improper conduct of the plaintiff, the defendant had received no benefit, it afforded a defence to the action. In another case of *King v. Boston*, *Midd. Sess.* after East, 1789, Lord KENYON held, that where a horse was sold for twelve guineas

The most simple defence to a demand established by the plaintiff is to shew that it has been satisfied; the proof of which lies wholly on the defendant. This may be done either by payment of money, or by the delivery of some other thing in satisfaction of the debt. In the last case, the defendant must prove the agreement of the plaintiff to accept the thing in satisfaction, and that it was so delivered by the defendant, and accepted by the plaintiff. In answer to this, it will be open to the plaintiff to prove, on his part, that the thing delivered was not intended to be a complete satisfaction, but only a partial payment.^(f) Where

neas, and warranted sound, and the defendant had paid three, the defendant in an action for the price of the horse, might prove the unsoundness, and that a guinea and a half was the full value of it. The cases on the subject were all (except that last cited in this note) brought before the Court in a late case of *Basten v. Butler*, 7 East, 479, Trin. 46 Geo. 3, where the plaintiff, a carpenter, having contracted to make some buildings on the defendant's farm (the defendant finding timber) performed the work so badly that it fell down, and the Court determined that this fact might be given in evidence on the *quantum meruit*, though no notice had been given to the plaintiff of such a defence. And LAWRENCE and LE BLANC, Justices, intimated an opinion, that even in cases where the plaintiff stipulated for a certain price, if the defendant gave previous notice of such his defence, he might be permitted to shew that the plaintiff had not entitled himself to that price, by performing the work according to his agreement. The Common Pleas, however, in Hilary Term preceding, held that the negligence of an attorney, in not opposing the justification of bail, could not be made the ground of defence to an action on his bill. In that case the Chief Justice said he would not go the length of saying, that in no case could negligence in the party suing be used as a defence to the action, though he thought it could only be used where the negligence had been such, that the party for whom the work was done, had thereby lost all possibility of benefit from such work; but that was not the case there, since a judgment had been obtained, and its fruits might thereafter be had by the defendant. Mr. J. ROOKE appears also to have taken the distinction between the case of a partial benefit and none at all being rendered to the defendant; but the other Judges (HEATH and CHAMBERS) seem to have been of opinion that no degree of negligence could furnish a defence, but that it must be made the subject of a cross action. *Templer v. M^r Lachlan*, 2 Bos & Pul N. R. 136. Vide *Farnsworth v. Garrard*, Campb. N. P. 38. *Fisher v. Samuda*, *ibid*. 190. In the first of which Lord ELLENBOROUGH held, that a man being employed to build a wall, and having built it so unartificially that it was obliged to be taken down, was not entitled to recover any thing for his work; but that if the wall, as it then stood, might be taken down and re-built with the same materials at less expense than it could without them, the plaintiff was entitled to recover *pro tanto*. And in *Lewis v. Cosgrave*, 2 Taunt. 2, it was holden, that in an action on a banker's check given as the price of a horse, which the plaintiff knowing to be unsound had warranted sound, the defendant having tendered back the horse, might make the breach of warranty a defence to the action.

(f) In an action on a note, under the plea of payment, accord and satisfaction cannot be given in evidence. *Church v. Rhodes*, 1 Root's Rep. 141.

A note is not an extinguishment or payment of a pre-cedent debt, unless there be an express agreement to accept it in payment, and to take the risk of the solvency of the maker. *Tobey v. Barber*, 5 Johns. Rep. 68. *Murray v. Governor et al.*, 2

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Fitch v. Sutton, 5 East, 230.

the payment is in money, after the day of payment is past, no such question can arise, for the payment of a less sum, after the promise is broken, can never be set up as a discharge of a greater, though accepted by the creditor as such, unless he execute a formal release under seal. In this case, therefore, only two questions can arise ;

1st. The fact of payment.

2d. The application of the money paid.

The fact of payment, if made to the plaintiff in person, and a receipt on a proper stamp were given, is proved by evidence of the plaintiff's hand writing : in other cases it is generally proved by the testimony of some person who was present when the money was paid. But the fact of payment may be presumed from circumstances without any direct proof. Mere length of time will, as we have before observed, (1) afford in many cases a presumption of payment ; and on a similar principle Lord KENYON held, that proof of the plaintiff and other workmen having come

(1) Ante, 47.

Johns. Cas. 438. *Herring v. Sanger*, 3 Do. 71. *Sehermerhorn et al. v. Loines et al.* 7 *Johns. Rep.* 311. *Johnson v. Weed et al.* 9 Do. 310.

Vide *Kiddie v. Debrutz*, 1 *Hayw. Rep.* 420.

But the acceptance of a negotiable note, on account of a prior debt, is *prima facie* evidence of satisfaction ; and the plaintiff cannot recover on the old debt without shewing the note to have been lost, or producing and cancelling it at the trial. *Holmes et al. v. D'Camp*, 1 *Johns. Rep.* 34. *Pintard v. Tuckington*, 10 Do. 104.

In *Pennsylvania*, there being no Court of Chancery, in order to prevent the failure of justice, the defendant in an action on a bond, under the plea of payment, may prove mistake or want of consideration. *Swift v. Hawkins et al.* 1 *Dall. Rep.* 17.

In a *scire facias* per mortgage, he may shew an eviction by title, paramount to the plaintiff's. *Steinhaner v. Whitman*, 1 *Serg. & R. Rep.* 438. *Hart v. The exrs. of Pauer*, 5 Do. 201.

And under the plea of payment with notice, fraud either in the execution or consideration of a bond, may be given in evidence, and the plea of "layman, unlettered, &c." is not necessary. *Baring v. Shippen*, 2 *Binn. Rep.* 154.

The rule of the *Pennsylvania* law has been adopted in Circuit Court, that under the plea of payment with leave, evidence may be given, which shews that *ex equo et bono*, the plaintiff ought not to recover. *Latapee v. Pecholier*, April, 1808, *M. S. Rep.*

In debt on bond, the receipt of a sum smaller than the amount of the condition, and an acknowledgment of full satisfaction, are good evidence under a plea of payment. *Henderson v. Moore*, 5 *Cranch's Rep.* 11.

Under the plea of payment in *assumpsit*, a set-off cannot be given in evidence. *Evans v. Norris*, *ibid.* 411.

A bond will be deemed an extinguishment or payment of a prior simple contract. *The State v. Gordon*, 1 *Bay's Rep.* 491.

When keeping a note an unreasonable length of time will be presumed payment. *Pons' exrs. v. Kelly*, 2 *Hayw. Rep.* 43. Ante, 302, n. (a)

Two persons were joint owners of a hogshcad of rum, and the Sheriff, by virtue of an execution against one of them, seized the rum and sold the whole to the defendant ; in an action of trover, brought by the other joint owner, it was held, that a

regularly to receive their wages from the defendant at stated times, and the plaintiff never having been heard to complain that he had not been paid,(1) was presumptive evidence of payment in an action brought at a distant time afterwards. If the money be paid to a servant, or other third person, for the use of the plaintiff, it must be shewn, in addition to the fact of payment, that the person to whom the payment was made, had either a general authority to receive money, as being accustomed to receive it in the plaintiff's shop, or the like; or else that he had a particular authority for the occasion.(u) As where a man sends a horse to a fair to be sold, the presumption is, that he means to entrust the person who has the horse rather than a mere stranger with the money, and therefore payment to him is payment to his principal.(2) So where a broker sells the goods of *A.* to *B.* without naming his principal, and gives the usual bought and sold note to the buyer and the seller, and the buyer afterwards pays him, this is payment to the principal;(3) and if the buyer, having bought other goods of the same broker, pay him generally, on account, a sum of money more than sufficient to satisfy one demand, but not enough to discharge both, each of the sellers must, in case of the insolvency of the broker, apply a proportionable share of the money received by the broker towards the discharge of his debt, and can only recover the balance. Payment to the plaintiff's attorney, after he is privately changed, without leave of the Court, is also a good payment to the plaintiff;(4) but payment to a country attorney, to whom he who is properly concerned for the plaintiff sends a writ for the mere purpose of getting it executed, is not sufficient;(5) neither will a payment made to an attorney on record, but who, in fact, was never employed by the plaintiff, discharge the defendant,(6) So that in all these cases the defendant should be prepared to shew that the attorney was employed by the plaintiff.(x)

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(1) *Lomas v. Novosilenski*, 1 Esp. N. P. C. 296.

(2) *Anon.* 12 Mod. 230.

(3) *Favens v. Bennett*, 11 East, 36.

(4) *Powell v. Little*, 1 Black, 8.

(5) *Yates v. Freckleton*, Doug. 693.

(6) *Robson v. Eaton*, 1 T. Rep. 62.

release of all actions to the Sheriff by the plaintiff, was no bar to the action against the defendant. *Wilson et al. v. Reed*, 3 Johns. Rep. 175.—Am Ed.

(u) Payment to one partner is a payment to all the co-partnership, unless, perhaps, where it is forbidden by the company. *Scott v. Trent*, 1 Wash. Rep. 101. *S. P. Black v. Bird*, 1 Hayw. Rep. 273.

A payment to a clerk of the party, (which clerk received it in the usual course of business,) is a payment to the party himself. *ibid.*

A payment to the partner of one, who was the creditor's attorney, but not joined in the power of attorney, is not payment to the principal. *Brown v. Bull*, 3 Muss. Rep. 211.

(x) In *Virginia*, it has been ruled, that a payment to an attorney at law is good on the custom of the country, particularly if he have possession of the specialty. *Hudson v. Johnson*, 1 Wash. Rep. 16. *Branch v. Burnley*, 1 Call. Rep. 147. *McRea v. Brown*, 2 Munf. Rep. 43. *Wilson v. Stokes et al.* 4 De. 455.

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(1) *Owenson v. Morar*, 7 T. Rep. 64.

(2) *Warwic v. Noukes*, Peake's N. P. Cas. 67.

(3) *Hawkins v. Rutt*, Peake's Cas. 186.

(4) *Egg v. Barnett*, 3 Esp. Cas. 196.

If a bill of exchange be paid by the defendant to the plaintiff, and the plaintiff is guilty of negligence in not giving notice of its dishonour, this will be considered as payment. But where the promissory notes of a banker were given in payment for goods at the time of the purchase, which notes afterwards turned out to be of no value, on account of the banker having then stopped payment, it was held that this was no satisfaction of the debt, unless the seller expressly agreed to run the risk of their being paid.(1) If the creditor desire his debtor to remit a bill by the post, and the letter containing it miscarry, the creditor must stand to the loss.(2)(y) But in such a case it has been held, that the delivery of the letter to a bellman in the street, and not at a regular receiving house, is not a compliance with the directions of the creditor, and that in case of its miscarriage when so delivered, the loss will fall on the person so improperly sending it.(3) On the same principle it would probably be held, that the sending of bank notes uncut would not discharge the debtor, where he was directed in general terms to remit by the post, because amongst prudent people it is usual to cut such securities in halves, and send them at different times. In case the creditor gave no specific directions as to the mode of remittance, the proof of putting the letter containing the bills or notes into the post, would be *prima facie* evidence of their safe arrival; but this might be answered by proof, on the part of the creditor, that the bills or notes got into other hands, and were received by some person with whom he had no connection. The mere circumstance of the defendant having drawn a check on his banker, payable to the plaintiff or bearer, affords no proof of payment, because, being payable to bearer, it does not appear that it was ever in the hands of the plaintiff; but if he endorse his name on it, this is sufficient to call upon him to shew that it was paid on some other account.(4)

Under particular circumstances, the above rule might not apply; as if notice were given that no such power was vested in the attorney. *ibid.* Vide *Denton et al. v. Noyes*, 6 Johns. Rep. 296.—AM. ED.

(y) A Sheriff having an execution in his hands, and the return day being passed, the creditor's attorney writes to the Sheriff, presuming him to have the money, and requests him to send it to him by mail; at that time the Sheriff had not received the money; several months after he received it and put it into the post-office, directed to the creditor's attorney, to whom it was never delivered. In an action against the Sheriff, it was held, that the money was sent at his own risk, though, if he had sent it on receiving the attorney's letter, it would have been at the risk of the creditor. *Wakefield v. Lithgow*, 3 Mass. Rep. 249.—AM. EP.

As to the application of money paid, the rule is, that the person paying may direct the application of it; and, therefore, where there are more accounts than one between a debtor and his creditor, as for instance, one debt on a bond, and another on a simple contract, if the debtor, when he pays a sum of money, declare that he pays it specifically on either of these accounts, the creditor cannot afterwards place it to the other.^{(1)(z)} <sup>Ch. II. s. 5.
Payment.</sup> But if the payment be general, and no specific application made

(z) In *Connecticut*, the general rule is settled, that he who pays the money has a right to direct the application, if there be several duties to which it may be applied; but if he neglect to do it, the person receiving it may make his election. *Kissam et al. v. Burrall*, *Kirb. Rep.* 326. *Gwinn et ux. v. Whitaker's adms.* 1 *Har. & Johns. Rep.* 754.

So in *New York*, *Mann v. Marsh*, 2 *Caines' Rep.* 99. *Coleman & Caines' Cas. in Prac.* 365.

So in *N. Carolina*, *Ray v. Mariner*, 2 *Hayw. Rep.* 385.

The same rule was recognised in the *Supreme Court of the United States*. *Mayor &c. of Alexandria v. Patten*, 4 *Cranck's Rep.* 317.

But where a creditor has two demands against his debtor, and the debtor pays a sum of money, without directing to which it shall be applied, if the amount paid, exceeds one of the demands, and is exactly equal to what remains due on the other, it will be considered as having been paid in discharging that other. *Robert et al. v. Garnie*, 3 *Caines' Rep.* 14.

If the debtor neglect to make the application, at the time of payment, the election is then cast upon the creditor, yet it is incumbent on him in such a case, to make a recent application by entries in his books or papers, and not to keep parties and securities in suspense, as interest, governed by events, may dictate. *Hill et al. v. Southerland's exrs.* 1 *Wash. Rep.* 166. Vide *Thompson v. Davenport et al.* *ibid.* 161.

A payment ought, in the first instance, to be applied to the discharge of the interest accrued, and if a balance of payments remains due, then to deduct it from the principal. *North v. Mallett*, 2 *Hayw. Rep.* 151. *Frazier v. Hyland*, 1 *Har. & Johns. Rep.* 98. *Tracy v. Wikoff*, 1 *Dall. Rep.* 124.

If the debtor is indebted on mortgage or bond, and simple contract, and when he makes a payment, should neglect to apply it, the law will make application of it in the way most advantageous to the debtor, that is to the mortgage or bond. *Gwinn et ux. v. Whitaker's adms.* 1 *Har. & Johns. Rep.* 754.

Neither debtor, nor creditor, has made the application of the payments, the Court will apply them to the debts for which the security is most precarious. *Field et al. v. Holland et al.* 6 *Cranck's Rep.* 8.

A payment for which a receipt is given to a person in his own name, is evidence of payment on his own account, and that it was not made on account of a debt due from him and another, though there do not appear any directions to apply it to the separate account; and this inference will be drawn, especially if such payment be for the exact amount of a balance due from himself, and would exceed the joint debt. *Robert et al. v. Garnie*, 3 *Caines' Rep.* 14.

In *South Carolina*, it has been decided, that where money is paid on account of three bonds generally, and more than enough to pay off the two first, those two shall be considered extinct under the *depreciation law*, and the balance shall be carried to the credit of the third bond. *Exrs. of Huger v. Bocquet*, 1 *Bay's Rep.* 407.—*AN. Ed.*

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Payment.

by the debtor at the time of payment, the creditor may, unless in cases where the debtor is indebted in different characters, or, having ceased to be a trader, subjected himself to the operation of the bankrupt laws, or where the interest of third persons would be affected, place the money paid to which account he pleases. Thus where the plaintiff served the defendant three years under an indenture, and three more under a simple contract, having during both periods received goods and money generally on account of wages, the whole of which receipts would, if placed to the account of the first service, be more than sufficient to satisfy it, but which were all blended in one account. He afterwards brought two actions, the one in covenant, the other in *assumpsit*, upon which the defendant attempted to appropriate so much of the payment as was sufficient to satisfy the first account, to the action of covenant, but the Court held, that the plaintiff had his election to ascribe to the second debt, for which he had the worst security, the money received during the second period, and might therefore recover in both actions.(1) But where one account is with the debtor in his own right, and the other as executor, the law will consider the payment as made on account of himself individually, and will not permit the creditor to apply it to any other account.(2) So where a trader being indebted pays money, and after leaving off trade contracts a further debt, and makes further payments, if nothing be said as to the application, the law applies the payment to the first debt, so as to prevent the creditor from taking out a commission of bankruptcy, if sufficient has been paid to reduce the debt, contracted while the party was a trader, under 100*l*.(3) for it shall be intended that the party, who made the payment, did not mean after he had ceased to be a trader, that the old debt should remain unextinguished, so as to make him liable to the bankrupt laws.

(1) *Peters v. Anderson*, 5 Taunt. 590.

(2) *Goddard v. Cox*, 2 Stra, 1194.

(3) *Meggott v. Mills*, 1 Lord Raym. 286.
Dawe v. Holdsworth,
Peake's Cas. 64, as explained
5 Taunt. 602.

(4) *Newmarsh v. Clay*, 14 East, 239.

Again, where *A.* having dealt for a long time with *B.* and *C.* as partners, not knowing that they had a third partner, furnished them with goods, and received money on account generally, continuing the same course of dealing after the secret dissolution of the partnership, after which some bills paid during the partnership were dishonoured and delivered up on new good bills being paid in lieu of them; it was holden,(4) that such delivery up of the old dishonoured bills, upon receipt of the now good ones, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt; and that the secret third partner might avail himself of such discharge, in an action against himself, jointly with *B.* and *C.* Lastly, where a person keeping

cash with a banker, deposited with him the note of a third person for a sum of money, telling him at the same time that it was a note made for his accommodation, and afterwards paid a sum of money into the banker's hands without making any specific appropriation of it, Lord Kenyon held that this money must be placed, as far as it would go, towards the discharge of the then existing debt,⁽¹⁾ and that the banker could not hold the maker of the note responsible for more than the balance remaining due at the time of such payment, though he afterwards trusted his debtor with a further sum of money.

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(1) *Ham-
mersley v.
Knowles*,
2 Esp. Cas. 56.

The most ordinary special pleas are,

1. A set-off of a debt due from the plaintiff to the defendant.
2. The Statute of Limitations.
3. A tender of the money before the commencement of the action.

As to the first, it should be observed, that where a particular sum of money is received by the defendant, who is entitled to retain a part of it for his labour; or the plaintiff agrees to money being retained by the defendant to satisfy himself some other demand; these² are not properly matters of set-off, but are evidence under the general issue as payment.⁽²⁾ But where it becomes necessary for the defendant to have recourse to the Statute of Set-off, he must prove the same facts in support of his counter demand, as if he himself were plaintiff in another action; and if he has not pleaded his set-off, but giving notice of it, he must be prepared to prove the delivery of such notice. A set-off can only be made where both the plaintiff's and defendant's demands are certain and liquidated.^(a)

Set-off.

(2) *Dale v. S. 1st, 4 Burr.*
233.

(a) In *Massachusetts*, a demand which the defendant is entitled to set off, under the Stat. of 1793, c. 75, s. 4, must be such a demand as has arisen from transactions between the parties on the suit. *Holland v. Mayspeace*, 8 *Mass. Rep.* 418.

Dealings between the parties to the record only can be set off. *Prior v. Jacocks*, 1 *Johns. Cas.* 169.

The decisions in *New York*, seem different. *Caines v. Brisban et al.* 13 *Johns. Rep.* 9.

In *Pennsylvania*, debts which can be set off, must be such as are due in the same right. *Darrock's exrs. v. Hay's adms.* 2 *Yeates' Rep.* 208. *Dunkin v. Calbraith*, 1 *Brown's Rep.* 48.

But it is not essential to a set-off, that the defendant should be able to sue for the demand in his own name. *Murray v. Williamson*, 3 *Binn. Rep.* 185.

It may be either by or against an executor or administrator. *ibid.*

Whether after a verdict against the defendant as executor, he can, on motion, be allowed to set-off against the amount or debt due to him personally by the plaintiff, for which he has obtained judgment, *dubitat*. *Wain v. Anthony*, 5 *Serg. & R. Rep.* 468.

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Limitations.

The Statute of *Limitations* is pleaded in two forms; as, first, that the defendant did not undertake within six years next be-

The Statute of Set-Off, is to be liberally expounded, to advance justice and prevent circuity of action. *Tuttle v. Beebe*, 8 *Johns. Rep.* 118.

Liquidated debts may be set off, but not those which are *unliquidated*. *Webb v. Fitch*, 1 *Root's Rep.* 177. *Brown v. Cuming*, 2 *Caines' Rep.* 33. *Kachlin et al. v. Mulhaddon et al.* 2 *Dall. Rep.* 237. *S. C.* 1 *Yeates' Rep.* 571. *Stiles v. Donaldson*, *ibid.* 264. *S. C.* 2 *Yeates' Rep.* 105. *Hogg v. Ashe*, 1 *Hayw. Rep.* 471. *Rep. in Co. of Conf.* 1. *Welford v. Greenlee*, *ibid.* 78. *Gibbes v. Mitchell*, 2 *Bay's Rep.* 351. *Morrison v. Hart*, *Hard. Rep.* 150. *Taylor v. Stout*, 1 *Coxe's Rep.* 53. *Smock v. Morford*, 1 *South. Rep.* 306. *Keeler v. Adams*, 3 *Caines' Rep.* 84. *Hazlehurst et al. v. Bayard*, 3 *Yeates' Rep.* 152.

An officer is empowered to set-off one execution against another between the same parties, and both in his hands at the same time. *Culver v. Pearl*, 1 *Tyl. Rep.* 12.

The penalty of a bond cannot be set off, but the sum actually due. *Burgess v. Tucker*, 5 *Johns. Rep.* 105.

The defendant cannot set off a claim for bad debts, made by the misconduct of the plaintiff in selling the defendant's goods as factor, the plaintiff not having guaranteed those debts; but such misconduct is proper to be inquired into a suit for that purpose. *Winchester v. Hackley*, 2 *Cranch's Rep.* 342.

A debt rendered certain by judgment may be set off, even though in a different Court. *Schermerhorn v. Schermerhorn*, 3 *Caines' Rep.* 190. *Devoy v. Boyer*, 3 *Johns. Rep.* 247. *Noble v. Howard*, 2 *Hayw. Rep.* 14.

Sed vide *Brewerton v. Harris*, 1 *Johns. Rep.* 144. *Goodenow v. Buttrick*, 7 *Mass. Rep.* 140. *Makepeace v. Coates et al.* 8 *Do.* 451. *Greene admr. v. Hatch*, 12 *Do.* 195.

A Court of Law allows set-off of judgments *ex gratia*; but Courts of Equity as a matter of right. *Simson v. Hart*, 14 *Johns. Rep.* 63.

An award for the payment of money may be set off. *Burgess v. Tucker*, 5 *Johns. Rep.* 105.

A debt not due at the time of the commencement of the action, cannot be set off. *Bull v. Hopkins*, 7 *Johns. Rep.* 22. *Reed v. Ingraham*, 3 *Dall. Rep.* 505. *S. C.* 2 *Yeates' Rep.* 487. 4 *Dull. Rep.* 166. *Tuberville v. Selj*, 2 *Wash. Rep.* 61. *Hawthorn v. Roberts*, *Hard. Rep.* 70. *Carpenter v. Butterfield*, 3 *Johns. Cas.* 145. *Jefferson County v. Chapman*, 19 *Johns. Rep.* 322.

In *Pennsylvania*, an equitable demand may be set off. *Murray v. Williamson*, 3 *Binn. Rep.* 135.

In what suits set-offs will be allowed.

In *Connecticut*, on a hearing in damages on a note which is defaulted, a claim on the ground of another agreement by the defendant cannot be set off. *Phillips v. Balsey*, 1 *Root's Rep.* 194. *S. P. Branch v. Riley*, *ibid.* 541.

In a hearing in damages in an action of covenant, the Court will not allow a set-off of mutual covenants. *Cochran v. Leicester*, 2 *Root's Rep.* 348.

In an action brought by the *Commonwealth of Pennsylvania*, a set-off was refused. *Commonwealth v. Matlack*, 4 *Dall. Rep.* 303.

The assignee of a policy of insurance, takes it subject to every set-off that existed, as between the original parties, before the assignment. *Gourdon v. Ins. Co. of N. America*, 3 *Yeates' Rep.* 327. 1 *Binn. Rep.* 430, in note. *Rousset v. Ins. Co. of N. America*, *ibid.* 429.

So, though it be an open policy, and the claim be for a partial loss. *Rousset v. Ins. Co. N. America*, *ibid.*

fore the commencement of the action; or, secondly, that the cause of action did not accrue within that time. The last form

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A set-off to an open policy of insurance cannot be allowed. *Gordon v. Browne*, 2 *Johns. Rep.* 150.

A set-off is not admissible, where the demand against the plaintiff arises from an act done by him of a *tertious* nature. *Gogel v. Jacoby*, 5 *Serg. & R. Rep.* 122.

Damages on special contracts, cannot be set off in an action of debt. *Smock v. Morford*, 1 *South. Rep.* 306

The same principle was recognised in *North Carolina*. *State v. —*, 1 *Hayw. Rep.* 221.

In a special action on the case for damages, a set-off will not be admitted. *Keeler v. Adams*, 3 *Caines' Rep.* 84. *Coleman & Caines' Cas. in Prac.* 435. *Stone v. Rafter*, 1 *Har. & Johns. Rep.* 364.

In an action of debt brought on an arbitration bond for the amount of an award, a set-off will be allowed. *Burgess v. Tucker*, 5 *Johns. Rep.* 105.

A set-off will be allowed in an action of *assumpsit*, even though an action of trespass is also depending between the same parties, and being first called on, is continued. *Allen v. Horton*, 7 *Johns. Rep.* 23.

The costs allowed the present defendant against the present plaintiff, in three former suits, were admitted as a set-off against the damages recovered by the plaintiff against the defendant in the present suit. *Cole v. Grant*, 2 *Caines' Rep.* 105. *Coleman & Caines' Cas. in Prac.* 368.

The plaintiff in replevin may avail himself of a set-off on the same principle that the defendant may disprove discounts in any other suit. *Nicolson et al. v. Hancock et al.* 4 *Hen. & Munf. Rep.* 491.

Mutuality of debts.

When an action is brought against two upon their joint note, the individual demands of either may be set-off to the note. *Ashley v. Willard et al.* 2 *Tyler's Rep.* 391. Sed contra *Walker v. Leighton, et al.* 11 *Mass. Rep.* 140.

But a debt due from an individual partner cannot be set off in a suit brought for a partnership debt. *Lyle v. Clasen*, Col. & *Caines' Cas. in Prac.* 233. *Scott v. Trevis*, 1 *Wash. Rep.* 101. *Armistead v. Butler*, 1 *Hen. & Munf. Rep.* 176. *Perric et al. v. Fletcher*, 2 *Bay's Rep.* 146. *Smith v. Duncan*, *Mart. Ori. T. R.* 25. *Exrs. of Browne v. Thompson et al.* 1 *Coxe's Rep.* 2. *Williams et al. v. Hamilton*, 1 *South's Rep.* 220. *Ritchie et al. v. Moore*, 5 *Munf. Rep.* 383. *Tuckers v. Oxley*, 5 *Cranck's Rep.* 34. Vide *Purvisance v. Sutherland*, *Addis. Rep.* 291.

In *Massachusetts*, an officer having an execution in favour of *A.* against *B.* and *C.* and another in favour of *B.* against *A.* ought, if *B.* desire it, to set off one execution against the other. *Goodenew v. Buttrick*, 7 *Mass. Rep.* 140.

The commissioners on an insolvent estate, are to set off mutual claims between the creditors and deceased; but what an administrator received as such cannot be set-off against his own debt. *Stanford v. Hyde*, 1 *Root's Rep.* 597.

A note, purchased by the debtor of an insolvent, after an assignment for the use of creditors, and also after the note had become due, cannot be set-off by him, in an action brought by the assignees. *Johnson v. Bloodgood*, 1 *Johns. Cas.* 51. *S. C.* 2 *N. York Cas. in Er.* 302. *S. P. Freeland v. Howell*, 1 *Anth. N. P. Cas.* 59.

In an action brought by the assignees of a bankrupt, on a note due to the bankrupt's estate, the defendant cannot set-off a check issued by a bankrupt payable to bearer, bearing date before the bankruptcy, unless he prove the check came to his hands prior to the bankruptcy. *Ogden et al. v. Cooley*, 2 *Johns. Rep.* 274.

A commission of bankruptcy, is legal notice to affect the subsequent assignee of a

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is applicable to all cases, and the only one that can be made use of where the promise is executory, viz. to pay money, or to do

promissory note, with the right of setting-off mutual debts. *Humphries v. Blight's ass.* 4 *Dall. Rep.* 370.

But in an action by an endorser of a promissory note against the maker, the latter will not be allowed to prove a set-off against the original payee, unless he shew that the note was transferred *after it became due*, or for the purpose of defrauding the maker of his set-off. *Hendricks v. Judah*, 1 *Johns. Rep.* 818.

The defendant executed a stock contract, made payable to the original party, or his order; in an action brought by the assignee of such contract in his own name, on an assignment made before it became due, it would seem the defendant cannot set-off a debt due from the assignor. *Reed v. Ingraham*, 3 *Dall. Rep.* 505. *S. C. 4 Do.* 169. 2 *Yeates' Rep.* 487.

The Court will not order a judgment obtained against plaintiff by a third person, and assigned to the defendant, to be set-off against a judgment obtained by a plaintiff against the defendant, when the plaintiff has previously to the assignment of the judgment made over his property, for the use of his creditors. *Dunkin v. Calbraith*, 1 *Brownes' Rep.* 47.

The assignee of a policy of insurance is liable to any set-off, which the underwriters might have made against the assignor. *Rousset v. The Ins. Co. of N. America*, 1 *Binn. Rep.* 429.

If an administrator obtain judgment against the debtor of his intestate, and afterwards the defendant pays a sum of money as security in a bond for the intestate, the defendant may in a *scire facias post annum et diem* on the judgment, avail himself of such payment as an equitable defence. *Dorsheimer v. Bucher*, 7 *Serg. & R. Rep.* 9.

It is a principle of equity, wherever the Court finds mutual demands, to endeavour to set one off against the other, and Courts of Law in Pennsylvania, have adopted the doctrine of Courts of Chancery, with respect to equitable set-offs. *Morgan et al. v. Bank of N. America*, 3 *Serg. & R. Rep.* 73.

In an action on a bond, entered into by the defendant as surety, he cannot give in evidence as a set-off, that land, which, prior to the date of the bond, the plaintiff had agreed to sell him, had been levied on by an execution, issued upon a judgment against the plaintiff, by one of the plaintiff's creditors, subsequently to such agreement to sell. *Brotherton v. Huslet*, 3 *Serg. & R. Rep.* 334.

In an action for services performed by the plaintiff as house-keeper, and also for goods sold and delivered, evidence of acts of *malfesance*, by the plaintiff, in embezzling the property of the defendant, is not admissible by way of set-off, but may be given in evidence, under the plea of *non assumpsit* and payment with leave, &c. (DUNCAN, J. dissenting) *Beck v. Shener*, 4 *Serg. & R. Rep.* 249.

If a suit be brought by the assignee of an open account for the use of the assignee, the debtor will be allowed to set-off his claims against the assignee. *Winchester v. Backley*, 2 *Crunch's Rep.* 348.

Wherever the vendee is deceived in the purchase of land by misrepresentation, he may plead it, or give it in evidence in discount, against a bond given for the purchase money. *Adams v. Wylie*, 1 *Nott & M. Cord's Rep.* 78.

Where the defendant only goes to shew a defect in the article conveyed, or a defective title to part of the articles, or to one or more, where the title embraces several, it must be by discount. *Furrow v. Mayo*, *ibid.* 314.

In an action, brought against an obligor, on a joint and several bond, a payment made by the other upon account of it may be given in evidence, or fair discounts, in right of the other, may be set-off against it. *Mitchell v. Gibbs*, 2 *Bay's Rep.* 475.

Where a bond assigned to defendant, was offered in discount against one given by

an act at a distant time; for till that time is past, no cause of

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him to the plaintiff's intestate, a receipt is good evidence to shew that the assigned bond has been paid off, and such receipt is not bound by the Statute of Limitations. *Adams v. Compt. v. Alken, ibid.* 481.

A set-off will not be allowed to the prejudice of a *bona fide* purchaser, if it be claimed on the ground of equitable principles. *Wafford v. Greenlee, Rep. in Ca. of Conf.* 79.

Where goods are sold by a known factor of a house, a set-off cannot be made against their price by their purchaser, for a debt due from the factor, in his own right, if the goods be actually those of his principal, though the factor do carry on business for himself, and nothing be said at the time of sale respecting the ownership of goods. *Brown et al. v. Robinson et al. 2 N. York Cas. in Er.* 341.

The master of a vessel directed his agent to get his commissions, as master insured, and the broker had the policy effected in the name of the agent, on the commissions of the master, who was named in the policy, and known by the broker to the principal; the broker having discovered a total loss, in an action brought against him by the master for the same, it was held the broker had no right to set-off a debt due to him by the agent. *Poole v. Hoyt et al. 2 Johns. Cas.* 327.

If an assuer know that the policy, though in the name of the broker, is in fact effected on account of another, a set-off of a debt due from the broker, cannot be made in a suit by him on that policy, though it be carried on in the broker's name. *Gordon v. Church, 2 Caines' Rep.* 399.

A creditor of an insolvent debtor is not entitled to a set-off in an action brought by such debtor's factor, for goods sold to the creditor. *Boined v. Pelosi, 2 Dall. Rep.* 43.

Debts due by a factor to a purchaser, cannot be set-off against the demand of the original owner, brought by him against such purchaser. *Atkinson v. Teasdale, 1 Bay's Rep.* 299.

A. is indebted to B. and C. partners in trade, who issue a foreign attachment against his effects, in the hands of D. after the death of B. and C.; the executors of C. who was surviving partner, obtained a judgment against the defendant and garnishee. B. and C. were the endorers of a note which was discounted by D. and which after their death was protested for non-payment. The debt to D. by B. and C. cannot be set-off against the debt due by D. garnishee of A. to C's executors; A's debt upon the death of B. and C. became vested in their creditors generally, whose rights could not be charged by any subsequent proceedings between the executors and garnishee. *Cramond v. The Bank of The U. States, 1 Binn. Rep.* 64. *5 C. 4 Dall. Rep.* 391.

The lessee of land from an executor, cannot purchase in judgments against the testator, and set them off against the rent. *White v. Bandster, 1 Wash. Rep.* 314.

It would perhaps be otherwise, if the executor should have acknowledged, that he had a sufficiency of assets. *ibid.*

So an executrix selling property, agreed, that the creditors of the testator should be entitled if purchasers to a deduction, and the defendant (who was not a creditor) purchased at the sale, gave his bond; under the plea of payment, the defendant offered to set-off two bonds due from testator, which were assigned to him, since the institution of the suit; it was held, that the bonds were not a proper set-off, and the agreement extended only to purchasing creditors. *Brown v. Garland, ibid.* 331.

A demand due by an intestate, cannot be set-off to a bond given to the administrator. *Burton v. Chinn, Hard. Rep.* 252.

Where a person refused to set-off a debt, under an idea that he had an equitable defense; such conduct will not be considered a waiver of such right of set-off,

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action accrues.(1)(b) But as soon as the cause of action has accrued, the time begins to run; and in those cases where the cause of action arises from the negligence of the defendant, or

(1) Gould v. Johnson, 2 Lord Raym. 338. Saik. 422. S. C. Puckle v. Moor, 1 Vent. 191.

when the debt is transferred to another for a *bona fide* consideration, and without notice. *Picket v. Morris*, 2 Wash. Rep. 325.

When a party shall be considered as abandoning his right of set-off. Vide *Cleveland v. Clap et al.* 5 Mass. Rep. 201.—AM. ED.

Statute of Limitations.

(b) The Statute of Limitations is entitled to the same respect with other Statutes, and ought not to be explained away. *Clementson v. Williams*, 8 Cranch's Rep. 72.

For the distinction between a Statute of Limitations, and a retrospective law, vide *The Society, &c. v. Wheeler et al.* 2 Gallis. Rep. 141.

The Statute of Limitations does not run against the Commonwealth. *Kemp v. The Commonwealth*, 1 H. & Munf. Rep. 85. *S. P. Nimmo's exr. v. The Commonwealth*, 4 Do. 57. *Allaton's les. v. Saunders*, 1 Bay's Rep. 26. Vide *University of North Carolina v. Johnston*, 1 Hayw. Rep. 373. *Birch v. Alexander*, 1 Wash. Rep. 34. *The Inhabitants of Stoughton, Sharon & Canton v. Baker et al.* 4 Mass. Rep. 528. *Johnson v. Irwin*, 3 Serg. & R. Rep. 291. *Morris v. Thomas*, 5 Binn. Rep. 77.

In *scire facias* by the Crown against the drawer of a bill in the hands of a Crown debtor; held, that the claims of the Crown being only a *deviative* right, must stand in the same situation as that of the principal, and that the plea of the Statute of Limitations was a good bar. *Rex v. Morrall*, 6 Price's Ex. Rep. 24.

The Statute of Limitations of another State, cannot be pleaded in bar to an action, commenced in a Court in this State, by an inhabitant of such other State, on a note there executed. *Pearseall et al. v. Dwight et al.* 2 Mass. Rep. 24. *Byrne v. Crowninshield*, 17 Do. 55.

So in *Maryland*, in an action of ejectment twenty years possession was held to be no bar to the *Lord Proprietary*. *Tasker's les. v. Whittington*, 1 Har. & M. Hen. Rep. 151.

Under the Statute of Limitations in *Connecticut*, an action of *account* is not barred, not being considered as included therein. *Pond v. Pond*, 2 Root's Rep. 41.

Under the Statute in *Pennsylvania*, an account between factor and principal is not within the Statute. *Stiles v. Donaldson*, 2 Dall. Rep. 264. *S. C.* 2 Yeates' Rep. 105.

The Statute of Limitations will not bar a *fiduciary* possession, provided it be *fiduciary* as to the plaintiff, or those under whom he claims. *Spotswood v. Dandridge et al.* 4 Hen. & Munf. Rep. 139. *Hunter's exrs. v. Spotswood*, 1 Wash. Rep. 181.

Trusts are not strictly within the Statute of Limitations, but equity has adopted the principles of the Act. *Wallace et al. v. Duffield et al.* 2 Serg. & R. Rep. 527. Et vide *Harrison v. Harrison*, 1 Call's Rep. 428.

In general, length of time is no bar to a trust clearly established to have once existed; and where no fraud is imputed and proved, it ought not to exclude relief. *Prevost v. Gratz*, 6 Wheat. Rep. 497.

The Statute runs from the date of the patent, whatever it may be before. *Johnston v. Irwin*, 3 Serg. & R. Rep. 291.

A war suspends the operation of the Statute between the citizens of the two countries for the time during which it continues. *Wall v. Robson*, 2 Nott & McCord's Rep. 498.

The presumption of payment which arises from lapse of time, does not arise dur-

the non-performance of a duty, they cannot be revived by a new damage arising to the plaintiff, or acknowledgment by the defendant. As where the defendant sold wheat to the plaintiff as

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ing a state of war, in which the plaintiff is an alien enemy. *Dunlop v. Ball*, 2 *Cranch's Rep.* 180.

A fraudulent concealment of a right of action, is a bar to the operation of the Statute of Limitations. *First Mass. Turnpike v. Field et al.* 3 *Mass. Rep.* 201.

So in *Pennsylvania. Wharton's exrs. v. Lowrey*, 2 *Dall. Rep.* 364.

In *North Carolina. Sweat v. Arrington*, 2 *Hayw. Rep.* 129.

Where the defendant detains the chattel of *B.* the act will run only from the time *B.* knows where it is. *Berry v. Pulham*, 1 *Hayw. Rep.* 16. *Elmick's exrs. v. Rush*, *ibid.* 28.

The Statute will not operate where the debt could not be ascertained. *Backus v. Cleveland*, *Kirb. Rep.* 36.

But in an action of *assumpsit*, by a surety in a bond, who had paid a part of the debt, against the principal, the Statute of Limitations is a good plea. *Penniman v. Vinton et al.* 4 *Mass. Rep.* 276.

The Act of Limitations, generally speaking, will begin to run from the time the cause of action commenced. *Vance v. Grainger*, *Rep. in Co. of Conf.* 71. *Coomer v. Little*, *ibid.* 92.

It was from the time the subject of the action is in the possession of the defendant, unless intrusted with them for an indefinite time, and then only from demand, unless the plaintiff did not know of the defendant's having it, or could not find him. *Elmick's exrs. v. Rush*, 1 *Hayw. Rep.* 28. *Elmore v. Mills*, *ibid.* 359. *S. P. Aumont v. Sweet*, 2 *Bay's Rep.* 528.

If a trespass be begun by entering on lands above three years before the action, and continued till the action of trespass is brought, as the action is founded on the first tortious entry, the Statute will be a bar. *Pitman v. Casey*, 2 *Hayw. Rep.* 293.

The Act of Limitations cannot be pleaded by any other person than the defendant; as, for example, a garnishee cannot plead it. *Kennedy v. Fairman*, 1 *Hayw. Rep.* 459.

When the plea of the Statute of Limitations, does not state when the cause of action accrued, but only that the plaintiff came of age at a certain time, and did not bring his action within three years of that time, such a plea will be held bad on a general demurrer. *Perkins v. Turner et al.* 1 *Har. & M. Hen. Rep.* 400. *Franklin v. Exrs. of Camp*, 1 *Coxe's Rep.* 196. *Sed contra*, 2 *South. Rep.* 377.

In an action of *assumpsit*, if any articles be within six years, they will draw after them the articles beyond six years. *Cogswell exr. v. Delliver*, 2 *Mass. Rep.* 217.

If the plaintiff exhibit an account in which he gives credit for an article, within three years, and the defendant claim and endeavour to prove it to be of more value than is stated in the account, it will take the whole of the plaintiff's account out of the Statute. *Newsome v. Person's adm.* 2 *Hayw. Rep.* 242.

If the accounts be current, the Statute will only operate from the last item in the account current; but if they be separate and distinct accounts, they will not have this effect. *Kimball v. Person's adm.* *ibid.* 394.

By twenty-one years possession of land, a right of possession is acquired, which is not only sufficient to support a defence, but is a positive title under which one may recover as plaintiff in ejectment. *Frederick v. Searle*, 5 *Serg. & R. Rep.* 236.

The plea of the Statute of Limitations, is an insuable plea, and sometimes an honest one. *Tomlin's adm. v. Bow's adm.* 1 *Gilmer's Rep.* 1.

It seems that the Statute of Limitations, in regard to real actions, does not apply to actions of *dissein*. *Hitchcock v. Harrington*, 6 *Johns. Rep.* 290. *Sed contra*, *Mitchell v. Poyas*, 1 *Nov. & M. Corb's Rep.* 25.

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- spring wheat, which the plaintiff in consequence re-sold as such, and was afterwards obliged to pay damages recovered against him by the person to whom he sold, the Court held his cause of action to have arisen at the time he discovered the wheat to be of a different quality from that for which it was sold, and not at the time when the judgment was recovered against him by the person to whom he sold. (1) So where an attorney being employed to search at the Bank of *England*, whether stock was standing there in the names of certain persons, omitted to make the search, and on the discovery of the omission six years afterwards, said that the neglect arose from the omission of his clerk, and that he must be responsible, it was held that the cause of action arose at the time of the neglect, and was not revived by the subsequent acknowledgment. (2) But in cases of mere debts due above six years, a promise or acknowledgment of the debt by the defendant within that time, before the commencement of the action, will revive the debt. Where a mutual unliquidated account, consisting of cross demands, is subsisting between the parties, if any item be within six years, this prevents the operation of the Statute on the rest, for each new item is an acknowledgment that the account remains unsettled: (3) but, if the demand be all on one side, one item being within six years, will not take the others out of the Statute. (4)* In cases where the Statute has operated, a very little matter has been held to be sufficient, and the slightest acknowledgment, whether made to the plaintiff, or in any dealings with a third person in which he had no concern, (5) will raise a fresh promise, or give a fresh cause of action. Thus, if the defendant say, "prove your debt, and I will pay you;" (6) or, "I am ready to account, but nothing
- (1) *Batley v. Faulkner*, 3 B. & A. 238.
- (2) *Short v. M'Carthy*, 3 B. & A. 698.
- (3) *Catling v. Skoulding*, 6 T. Rep. 189.
Crane v. Kirkman,
Peake's Cas. 121.
- (4) *Cotes v. Harris*, Bul. N. P. 149.
- (5) *Mountstephen v. Brooke*, 3 B. & A. 140.

(6) *Heyling v. Hastings*, Salk. 29.

An action for rent reserved by indenture of lease, is not within the Statute of Limitations. *Bailey v. Jackson*, 16 *Johns. Rep.* 210.

In *Massachusetts*, the Statute of Limitations does not apply to suits in the Admiralty, for mariner's wages. *Brown v. Jones et al.* 2 *Gallis. Rep.* 477.—*AM. Ed.*

* The exception in the Statute as to *merchants accounts* does not properly fall within the plan of this work, which, as often before observed, is confined to the proof required in actions, and is not intended to discuss the law, further than is necessary to point out the evidence required; but I cannot avoid referring the reader to the very elaborate and learned note of Mr. Serjeant WILLIAMS, on this subject, in his addition of *Saunders*, vol. ii. p. 127.(c)

(c) In *New York*, the exception in the Statute of Limitations of "*actions which concern the trade of merchandise between merchant and merchant*," extends only to open accounts, and does not admit of a greater latitude, than has been given to the *English Statute*. *Ramchander v. Hammond*, 2 *Johns. Rep.* 200.—*AM. Ed.*

is due;"(1)* or, "if he has any demand on me, it shall be settled;"(2) or, on meeting the plaintiff soon after the delivery of his bill, say, "you have made an extravagant demand;" without insisting that it has been paid;(3) or, "that he was "surety for another person who had the money, but that he is willing to pay half of it;"(4) or "that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, by which he was discharged as well as by law from the length of time the debt accrued;"(5) or, "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted;"(6) or, "that the acceptance was in his hand-writing, and that he had been liable, but that he was not so then, because it was out of date, and it was not in his power to pay it;"(7) all these being acknowledgments that the defendant was once liable, and that there is an unsettled account between the parties, the law raises a promise to pay, on the plaintiff proving the existence of the debt. So a letter written by the defendant to the plaintiff, on being sued, couched in ambiguous terms, neither expressly admitting nor denying the debt, may be left to the jury to consider, whether it amounts to an acknowledgment;(8) and even an affidavit made for the express purpose of obtaining leave to plead the Statute, stating, that since making the bill of exchange on which the action was brought no demand had been made, may be so left.(9) But if the defendant deny that any debt was ever due, as if he say, in an action by an executor, "I acknowledge the receipt of the money, but the testator gave it me;"(10) this does not take the case out of the Statute. Payment of interest, by one of several makers of a joint and several promissory note,(11) takes it out of the Statute as to all; and it was in one case holden, that if one become bankrupt, and the creditor prove his debt, and receive a dividend under his commission, this takes it out of the Statute, as against the others also;(12) but this decision has been recently overruled.(13)(d)

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(1) and (2) by
Ld Mansfield,
in *Trueman*
v. *Fenton*,
Cowp. 548.

(3) *Lawrence*
v. *Worral*,
Peake's Cas.
93.

(4) *Yea, bart.*
v. *Fouraker*,
2 *Burr.* 1099.

(5) *Clarke v.*
Bradshaw,
3 *Esp. Cas.*
155.

(6) *Bryan v.*
Horsman,
4 *East*, 599.

(7) *Leaper v.*
Tatton,
16 *East*, 420.

(8) *Lloyd v.*
Maund, 2 *T.*
Rep. 760.

(9) *Rucker*
v. *Hanray*,
4 *East*, 604, n.

(10) *Owen v.*
Woolley, *Bul.*
N. P. 148.

(11) *Whitcomb v.*
Whiting, *Dougl.*
658.

(12) *Jackson*
v. *Fairbank*,
2 *H. Black.*
340. *Budd v.*
Birkenhead
Salk. 490.

(13) *Brandram v.*
Wharton, 1 *B. &*
A. 463.

* In *Swan v. Sewel*, 2 *B. & A.* 759, the plaintiff shewed the defendant the note on which the action was brought within six years; on which the defendant said, "you owe me more money, I have a set-off against you." *BATLEY* and *HOLROD* I. J. (dissentients, *BARR J.*) held, that this was not a sufficient acknowledgment to take the case out of the Statute.

Acknowledgment of Debt.

(d) The decisions on this subject are not only numerous, but conflicting, and indeed present more incongruity than is to be found on any other branch of the law. By the decision of *Hudson v. Cary*, in the Supreme Court of *Pennsylvania*, *March*

action, as it appears on the declaration, it is necessary for the plaintiff, in cases where the promise was not made within six

Term, 1824, the law is now settled, that the acknowledgment of the debt must be such as is consistent with a promise to pay.

Where the maker of a promissory note denied his signature, declaring the note to be a forgery; but said, if it could be proved that he signed the note he would pay it; and it was proved on the trial that he did sign it, this was held sufficient to take the case out of the Statute of Limitations. *Seaward v. Lord*, 1 *Grooml. Rep.* 163.

A new promise by an executor or administrator, within six years, takes the case out of the Statute of Limitations, as well in an action against the administrator *de bonis non*, as against the original executor or administrator, who made the promise. *Emerson v. Thompson et al.* 16 *Mass. Rep.* 429.

If a man acknowledge the principal of a debt, but dispute the interest, this will take the case out of the Act. *Henwood v. Cheeseman*, 3 *Serg. & R. Rep.* 500. *Et vide Patton's adm. v. Ash*, 7 *Serg. & R. Rep.* 116.

A recital in a deed is good evidence to take a case out of the Statute. *Moreteller et al. v. McLean*, 7 *Cranch's Rep.* 156. *Et vide Mount Stephen et al. v. Brooke* 3 *Barn. & Ald. Rep.* 141.

If the defendant, after being arrested by the Sheriff, promise to settle with the plaintiff if he will give time for payment, it is a sufficient acknowledgment to take the case out of the Statute. 4 *Johns. Rep.* 461. *Morris's les. v. Vanderen*, 1 *Dall. et al. Rep.* 64.

The acknowledgment of a debt after suit brought, takes it out of the Statute. *ibid.* *Danforth v. Culver*, 11 *Johns. Rep.* 146.

A bare acknowledgment of a debt within six years, without any evidence of promise or intention to pay, is sufficient to take it out of the Statute of Limitations. *Cowan v. Magauran*, 1 *Wall. Rep.* 66. *Cord et al. v. Shaler*, 3 *Con. Rep.* 131.

What will amount to such an acknowledgment? *ibid.*

A new promise to pay an account, barred by an Act of Assembly in Virginia special in its provisions, renews the obligation to pay. *Beall v. Edmondson*, 2 *Call's Rep.* 514.

In an action on a note where the defendant acknowledged he had executed the note, it was held sufficient. *Billews v. Bogan*, 1 *Hayw. Rep.* 13.

A person having written "he would rather come to a settlement, although he should allow the account as insisted on by the plaintiff, than wait the event of a law suit:" it was held sufficient to bar the Statute. *Ferguson v. Fitt*, *ibid.* 239.

A declaration by a defendant "I will not pay it, Rosser ought to pay it, I will speak to him about it," will bar the operation of the Statute. *Cobham ass. v. Mosely*, 2 *Hayw. Rep.* 6.

An admission by an executor of the signature of the testator with a promise that all his just debts should be paid, will have the same effect. *Cobham v. ——— admr.* *ibid.*

A promise in these words, "I will settle with him," will take the cause out of the Statute. *Toomer v. Long*, *ibid.* 18.

An agreement to refer the matters in dispute to arbitrators, will take the case out of the Statute of Limitations. *Colkins v. Thackston*, *Rep. in Co. of Conf.* 93.

The defendant's admission that he had given such a note, but averring that he had paid it, will not be sufficient to take the note out of the Statute. *Smith v. Freel*, *Addis. Rep.* 291. *Et vide Cadmus v. Dumon*, 1 *Coxe's Rep.* 176.

The mere admission of a fact which shews the debt to be unsatisfied without an

years before that time, but where a writ was sued out and returned within six years after the cause of action accrued, to state such writ and the day it issued specially in the replication.^(c)

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Where there have been more writs than one,⁽¹⁾ it must appear that they are regular continuances of each other, as a *latitat* on a bill of *Middlesex*, or the like; for an attachment of privilege would be no continuance of a common writ, being process of a different nature.

(1) *Smith v. Bower*, 6 T. Rep. 662.

To this replication the defendant rejoins, either by denying the writ, if none in fact issued, or stating the exact day it was sued out, if the plaintiff only mentions the *teste*, and pleading that he did not undertake within six years next before the suing it out. In the last case the plaintiff's evidence will be the same

acknowledgment of the debt, will not take the case from the Statute's operation. *Ferguson v. Taylor*, 1 *Hayw. Rep.* 90.

In *Kentucky*, it has been decided, that to take a case out of the Statute, an express acknowledgment of the debt as due at the time, or an express promise to pay it, must be proved. *Bell v. Rowland*, *Hardin's Rep.* 301.

In this case the Court declared many of the *English* cases had gone unwarrantable lengths to evade the Statute of Limitations. *ibid.*

A mere admission of a debt will not charge the defendant with the whole of the plaintiff's demand, but he must still prove its amount. *Quarles's adm. v. Littlepage*, 2 *H. & Munf. Rep.* 401.

An acknowledgment of a debt due from a co-partnership, made after its dissolution by one of the partners, will bind the other partner. *Smith adm. v. Ludlow*, 6 *Johns. Rep.* 287. *S. P. Simpson et al. v. Geddes*, 2 *Bay's Rep.* 533. *Johnson v. Beardales et al.* 15 *Johns. Rep.* 3.

In *Pennsylvania*, a debt barred by the Statute will not be revived by a clause in a will ordering and directing that all the testator's just debts be paid. *Smith v. Porter et al.* 1 *Binn. Rep.* 209.

So in *Kentucky*, a creation, by will, of a trust of personal estate for the payment of debts, will not revive a debt barred by the Statute of Limitations. *Campbell v. Sullivan*, *Hardin's Rep.* 17.

But in *Virginia*, where a specific fund was charged by a testator with the payment of his debts, it was held that the Statute ought not to prevent the recovery of whatever remained of the *specific* fund, though it would not authorise a recovery out of the *general* fund. *Lewis's exr. v. Bacon*, 3 *H. & Munf. Rep.* 89.

In a case somewhat analogous, it was decided in *Virginia*, that such a trust estate would only extend to such debts as the testator was in conscience bound to pay, and not to a debt which was merely *nudum pactum*. *Chandler ex. v. Hill et al.* 3 *H. & Munf. Rep.* 124.

In *North Carolina*, such a devise was held to revive a debt so barred, though the Court intimated the decision was made out of deference to the anterior decisions, and not upon their own opinion of its propriety. *Anonymous*, 1 *Hayw. Rep.* 243.—*Am. Ed.*

(c) The plea of *non assumpsit* within five years, without saying before the institution of the suit, will refer to the time of pleading. *Smith v. Walker exr.* 1 *Wash. Rep.* 175. Vide *Henderson v. Foote*, 3 *Call's Rep.* 248.—*Am. Ed.*

as if he had traversed the plea, except as to the time. If the other a matter of record being put in issue, namely, the suing forth a writ duly returned and filed, the Court inspects the record, and gives judgment as in other cases on the plea of *nul tiel record*.(f)

The plaintiff may also reply that he originally commenced his action in an inferior Court within six years, and that the defendant removed it by *habeas corpus* ;(1) or that he obtained a judgment or an outlawry on an original within that time, which has since been arrested or reversed,(2) and that he commenced the present action within a year after the reversal. So if a man commence an action and die ;(3) or a *feme sole*, after the commencement of an action by her, marry, whereby it abates,(4) the executor or administrator in the one case, and the husband and wife in the other, have a reasonable time (which is generally understood to be a year) to commence a fresh action, and may reply the fact to a plea of the Statute. The defendant may, by his rejoinder, of course deny any of the facts so stated, and the issue will lie on the plaintiff to prove them, either by proof of the matter of record in the usual way, where that is traversed, or by proof of the matter in *pais*, before a jury, where such matter is put in issue.(g)

(1) *Matthews v. Phillips*, Salk. 424. *Gawer v. James*, Bul. N. P. 151.

(2) *Finch v. Lambie*, Cro. Car. 294. *Whitwick v. Hovenden*, 3 Lev. 345.

(3) *Matthews v. Phillips*, ut sup.

(4) *Forbes v. Ed. Middleton*, Wiles, 259, note (c.)

(f) When the Statute of Limitations is pleaded in bar of an action on a bail-bond, the Court will admit evidence to shew the exact day on which the judgment was entered. *Clark v. Ely*, 2 Root's Rep. 380.

Where the record of a judgment is entered generally of a term, and it becomes material to the rights of the parties to ascertain the particular day, such fact may be proved by evidence *abunde*. *Young v. Kenyon*, 2 Day's Rep. 252.

Whenever the actual time of suing out a writ becomes material, it may be shewn in contradiction to its fictitious test. *Wambough v. Schank*, Penning. Rep. 229.

The time of suing out the writ is the commencement of the suit, and the cause of action must be antecedent ; should it appear otherwise on the face of the proceedings, it will be fatal in a special demurrer. *Lowry v. Lawrence*, 1 Caines' Rep. 69. *Bird et al. v. Caritat*, 2 Johns. Rep. 342. *Cheetham v. Lewis*, *ibid.* 104.

A promise made on the 1st November, 1811, was sued on the 1st November, 1817; and it was holden to be barred by the Statute of Limitations. *Presbrey et al. v. Williams*, 15 Mass. Rep. 193.

Where an information for an offence, by reason whereof a forfeiture belongs to the treasury of the State, was presented to a justice of the peace, and a warrant issued thereon, within one year from the commission of the offence, it was held, the offence was not barred by the Statute of Limitations, although the offender was not arrested, examined, or tried, until after the expiration of the year. *Newell v. The State*, 2 Conn. Rep. 38.—A. N. Ed.

(g) If the action be brought before the time allowed by the Statute of Limitations expires, and it expire during the suit, the Statute will not operate. *Hummond v. Denton*, 1 H. & M. Hen. Rep. 200. *S. P. Brown's exs. v. Putney*, 1 Wash. Rep. 390.

Where a plaintiff, by issuing a writ, has saved the bar of the Statute, and the writ

When the plaintiff would excuse himself for not commencing his action in time, by reason of his being under either of the disabilities mentioned in the Statute such disability must be specially stated in the replication, and it must be added, that the action was commenced within six years after the removal of it; and, if the disability be traversed, the plaintiff must prove the existence and continuance of it.(h)

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has not actually abated, it is not necessary that the action should be prosecuted within a year after the six years expired. *Schlusser v. Leshar*, 1 *Dall. Rep.* 411. Vide *Brown's exrs. v. Putney*, 1 *Wash. Rep.* 390.

It is not a sufficient replication to the plea of the Act, that the plaintiff commenced a previous action within the period allowed by the Act, and after the expiration of the time was nonsuited by order of the Court. *Harris v. Dennis*, 1 *Serg. & B. Rep.* 236.

In *Maryland* it has been ruled, that where an action has been brought in due time after the reversal of a judgment for the same cause of action, it is saved by the clause in the Statute. *Drane v. Hodges*, 1 *H. & M. Hen. Rep.* 518.

The operation of the Statute, will not be prevented by a *scire facias* sued out, within the five years on which the plaintiff suffered a non-suit. *Peyton's adm. v. Carr's exr.* 1 *Randolph's Rep.* 436.

If a suit be commenced within the time, and there is a nonsuit after the time of the Statute has expired, the plaintiff may sue again within twelve months under the Statute, and then only the time elapsed before the first action will be counted. *Anonymous*, 2 *Hayw. Rep.* 63.

If an action abate or otherwise go off, and be not re-commenced within a year, all the time of its pendency will be counted. *ibid.* *Pearce v. House*, *ibid.* 386.

A writ taken out against one administrator where several are appointed and duly qualified, is null and void, and will not prevent the Statute of Limitations from running against the debt. *Hopkins v. M. Pherson's adms.* 2 *Bay's Rep.* 194.

A second writ against all the administrators after a discontinuance of the first, will not cure the defect where the Statute has run before the lodging of the writ in the Sheriff's office. *ibid.*

In *New York* it is doubted whether another action can be maintained, instituted directly after a previous action, under a Statute, within its time, has abated by the death of the defendant, who dies after the five years have expired. *Jackson ex. d. Frost v. Horton*, 3 *Caines' Rep.* 197.

If the plaintiff would avoid the Statute of Limitations by a former suit being commenced, he may plead the former suit specially, and cannot give it in evidence under the general issue. *Boyle v. Conway*, 3 *Call's Rep.* 1.

The purchaser of a chose in action sues first in his own name, is nonsuited, and then sues in the name of the vendor; the former suit will not suspend the Act of Limitations as to the present plaintiff, because there is no privity. *Halsey v. Bulkeley*, 2 *Hayw. Rep.* 234.—A.M. Ed.

(h) The exceptions in the Statute of Limitations will not be extended, by construction, to cases within the reason, but not within the letter of the exceptions. *Sacia v. De Graaf*, 1 *Cowen's Rep.* 356.

If one of the persons against whom a decree is given be an infant, his infancy will prevent the Statute of Limitations from barring those who must necessarily join with such infant in a writ of error to reverse the decree. *Kennedy v. Duncan*, *Hardin's Rep.* 365.

The terms "*beyond seas*," in the proviso of the Statute of Limitations of *Geor-*

The plea of *tender* goes only to defeat the plaintiff's right to costs, and therefore the defendant who pleads it, is always obliged to pay into Court, for the use of the plaintiff, as much as he

gia, are equivalent to *without the limits of the State*, where the Statute is enacted; and the party without those limits, is entitled to the benefit of the exception. *Murray's les. v. Baker et al.* 3 *Wheat. Rep.* 541.

And so of the Statute. 21 *James* 1 ch. 16. *Pancoast's les. v. Addison*, 1 *Har. & Johns. Rep.* 350.

In *Connecticut*, an absence at *Halifax*, without the jurisdiction of the *United States*, is not *beyond seas* within the meaning of the Statute. *Gustin v. Brattle*, *Kirb. Rep.* 299.

In *Pennsylvania*, a debt due from a person residing in *South Carolina*, was held to be barred if beyond the time allowed by the Statute. *Ward v. Hallam*, 2 *Dall. Rep.* 217.

But in *Maryland*, it has been ruled, that a residence in *Virginia* is being *beyond sea*, so as to come within the exception of the Statute. *Brent's les. v. Tasker*, 1 *H. & M'Hen. Rep.* 89.

This doubt has been obviated in *Massachusetts* by a legislative provision making the exception to being out of the limits of the Commonwealth. *White v. Bailey*, 3 *Mass. Rep.* 271.

The same provision appears to have been made in *New York*. *Ruggles v. Keeler*, 3 *Johns. Rep.* 263.

The Statute will run only from the time of obtaining letters of administration. *Tyson v. Simpson*, 2 *Hayw. Rep.* 147.

As to this rule in *Virginia*. Vide *Orwald v. Dickinson*, 2 *Call's Rep.* 16. *Faw v. Roberdeau's exr.* 3 *Cranch's Rep.* 174.

The Statute will not run in time of the revolutionary war. *Fuller v. Hancock*, 1 *Root's Rep.* 238.

In an action commenced in *Massachusetts*, the Statute of *New York* cannot be pleaded in bar of an action commenced in *Massachusetts*, by inhabitants of *New York*, upon a note executed in *New York* by citizens of *Massachusetts*. *Pearsall et al. v. Dwight et al.* 2 *Mass. Rep.* 84.

Foreigners who never have been in the *United States*, are within the exception of the Statute for the limitation of personal actions, and may bring their action within the time limited by the Statute, after their coming within the State. *Hall v. Little*, 14 *Mass. Rep.* 203.

In an action of *assumpsit* brought in *New York*, the defendant may set-off demands against the plaintiff, arising when both parties resided in *Connecticut*, and which, if sued in *Connecticut*, would be barred by its Statute of Limitations, provided six years have not elapsed since the plaintiff came into the State of *New York*. *Ruggles v. Keeler*, 3 *Johns. Rep.* 263.

Courts in one State are not governed, in actions on foreign contracts, by the Statute of Limitations of those other States where such contracts were made. *ibid.*

The saving of the Statute includes as well foreigners who have resided altogether out of the State, as citizens of the State who may be absent for a time. *ibid.*

A contract made in a foreign country is subject to the Statute of Limitations of the State where the suit is brought. *Kennedy v. Fairman*, 1 *Hayw. Rep.* 459.

The return of a debtor to the State to enable the Statute of Limitations to run must be such a return as will enable the creditor, by reasonable diligence, to arrest his body as security. *White v. Bailey*, 3 *Mass. Rep.* 271.

The Act of Limitations in *Virginia* begins to run against a creditor, residing out

admits to be due ;(1) and cannot plead the general issue, to the same part of the declaration as that to which he applies his tender ; but can only plead a tender as to part of the damages, and the general issue as to the residue.(i) The plaintiff may tra-

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(1) *Maclellan v. Howard*, 4 T. Rep. 194,

of the State, if he come into the State for temporary purposes, provided the debtor be at the time within the Commonwealth. *Faw v. Roberdeau's exr.* 3 Cranch's Rep. 174.

If a contract is made in *S. Carolina*, with the view to the receipt of money in *Pennsylvania*, the cause of action accrues upon the receipt of the money in *Pennsylvania*, and the Statute of Limitations of *S. Carolina*, is not a bar to the action. *Harper v. Hampton*, 1 Har. & Johns. Rep. 453.

When the Statute once begins to operate, its effect does not cease by the intervention of any subsequent legal disability. *Peck v. Trustees of Randall*, 1 Johns. Rep. 165. *Rogers v. Hill*, 3 Con. Rep. 398. *Fitzhugh et al. v. Anderson et al.* 2 H. & Munf. Rep. 289. *Fayouez et al. v. Prather*, 1 Nott & McCord's Rep. 296. *Walden v. The Heirs of Gratz*, 1 Wheat. Rep. 293. *Den ex d. Andrews v. Mulford*, 1 Hayw. Rep. 311. *Anon. ibid.* 446. *Kennedy & Co. v. Fairman*, *ibid.* 459. *Cobham's ass. v. Neill*, 2 Do. 5. *Pender v. Jones*, *ibid.* 294.

In an action on a promissory note made in *Connecticut*, our Statute of Limitations may be pleaded in bar. *Nash v. Tupper*, 1 Caines' Rep. 402.

It is a good plea in bar to an action on a judgment given in another State. *Hubbell v. Coudrey*, 5 Johns. Rep. 132. *Bissell v. Hall*, 11 Do. 168.

A creditor in a foreign country, having an agent here, is not therefore within the Statute of Limitations. *Wilson v. Appleton*, 17 Mass. Rep. 180.

If the defendant plead the Statute of Limitations in bar of a suit, a replication that the plaintiff was within one of the exceptions of the Statute, is good. *Perkins v. Burbank*, 2 Mass. Rep. 81.

The Statute of Limitations of another State cannot be pleaded in bar to an action commenced in a Court in this State by an inhabitant of such other State, on a note then executed. *Pearall et al. v. Dwight et al.* 2 Mass. Rep. 34.

In chancery, if the defendant in equity plead the Statute of Limitations, and the complaint come within any of the exceptions in the Act, he will not be entitled to the benefit thereof, unless he set it forth by a replication. *Lewis exr. v. Bacon*, 3 H. & Munf. Rep. 89.

It is a good plea to a suit in equity, brought to recover money collected by an attorney, for the plaintiff, and not accounted for by him. *Kinney's exrs. v. Mc Clure*, 1 Randolph's Rep. 284.

Vide ante, p. 51, n. (q) as to bonds, and post, Ch. X.—AM. Ed.

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(i) If there be a promise to deliver certain articles at a certain day, and no place be mentioned in the note, the creditor has the right of appointing the place. *Aldrich v. Albee*, 1 Greenl. Rep. 120.

A plea of tender of specific articles must state that they were kept ready until the uttermost convenient time of the day of payment. *ibid.*

In an action on a promise to deliver certain articles at a given day and place, it is a good bar that the defendant was ready at the day and place, to deliver the articles. *Robbins v. Luce*, 4 Mass. Rep. 474.

But if the delivery or tender of the thing be prevented by any contrivance or evasion of the other party, it will be equivalent to a tender. *Borden v. Borden*, 5 Mass. Rep. 67. *Frazier v. Cushmin*, 12 Do. 277.

There is a difference, as to tender, between portable and cumbersome articles ;

verse both the tender and the general issue, and then it will be incumbent on *him* to prove that the defendant was indebted to him in a larger sum than he admits, and on the defendant to

with respect to the former, a personal tender is necessary; as to the latter, it will be sufficient, if the defendant offer to deliver as the plaintiff shall direct. *Coit v. Houston*, 3 Johns. Cas. 243. *S. P. Slingerland v. Morse et al.* 8 Johns. Rep. 370.

A tender on a bond with a penalty does not bar an action on the bond. *Munmy v. Harris*, 2 Johns. Rep. 24.

Tenders are *stricti juris*, and never are supplied by equity. *Arrowsmuth et ux. v. Van Harkness's exrs.* 1 Case's Rep. 26. *Shotwell's exrs. v. Denman.* *ibid.* 174.

It is a general rule, that a tender must be made unconditional, and must be always of a definite and certain character. *Eastland v. Longshorn et al.* 1 Nott & McCord's Rep. 195.

A tender cannot be made after the commencement of the suit. *Fiskburne exr. v. Sanders*, *ibid.* 243.

Nothing but *gold or silver* is a legal tender under the Constitution of the United States. *McClarin v. Nesbit*. 2 Do. 519.

Treasury notes issued under the Act of Congress of 1814, ch. 77, and 629, being by their laws receivable in payment of duties, taxes, and land debts, due to the United States, for the principal and interest due thereon, are a good tender, and may be pleaded as such to such debts. *Thorncliffe v. U. States*, 2 Mason's Rep. 1.

A tender to one of several joint obligees, is a tender to all. *Warder et al. v. Arell*, 2 Wash. Rep. 359.

To make a tender good, the party must, at the latest time of the last day of the term of the contract, before sun set, proceed to the place of abode of the party if no place be fixed, and there produce the *money or goods*, and offer to comply with the contract. *Morton v. Wells*, 1 Tyl. Rep. 381.

If the adverse party be absent or refuse when present to receive the money or goods, or is incapable of performing the contract, the other need not count the money, nor display particularly the goods if he can shew otherwise that he has tendered the amount. *ibid.* *Slingerland v. Morse et al.* 8 Johns. Rep. 370.

Where *A.* shipped goods by the master of a vessel, and the consignee assigned the bill of lading to *C.* who demanded the goods and tendered a sum of money for the freight, but whether enough did not appear; the master refused to deliver the goods, assigning as a reason, orders from the ship owners not to deliver them, but made no objection to the tender of the freight; in an action of trover against *B.* it was held he had waived any tender of freight, and that his refusal was evidence of conversion. *Judah et al. v. Kemp*, 2 Johns. Cas. 411.

Where a promissory note was given, payable in *produce*, to be delivered by a certain day, at the maker's house; in an action on the note the defendant pleaded payment, and proved that he had hay in his barn, ready to be delivered on the day to the plaintiff, but did not shew the quantity or value, it was held that there was no proof of a tender or payment. *Newton v. Galbraith*, 5 Johns. Rep. 119.

A mere offer to pay the money, is not in legal strictness a tender. *Sheredine v. Gaul*, 2 Dall. Rep. 190. *S. P. Searight v. Culbraith et al.* 4 Dall. Rep. 395.

A person making a tender cannot insist on a receipt in full of all demands; but he must rely on the tender, and on proof at the trial, that no more was due. *Thayer v. Brackett*, 12 Mass. Rep. 450.

In *North Carolina.* *North et al. v. Mallett*, 2 Bayw. Rep. 152.

Where money is to be paid in goods, a tender of all the articles must be proved, not of some only enough in virtue to discharge the debt. *Thompson v. Gaylard*, *ibid.* 150.

When a specific article is to be delivered, and no place appointed, the debtor

prove his tender. If the plaintiff fail on the first issue, the tender will be the only matter in dispute, and to support this, the defendant must prove that he offered to pay the money, either

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Tender.

must give notice of his readiness to pay on the day, and request the creditor to appoint a place where he will receive it; and on the day he must attend until sun set to make the delivery, unless the creditor refuse or accept before. *England v. Witherspoon*, 1 *Huyw. Rep.* 361.

And so in the plea thereof. *Jonet v. Wagner*, 2 *Bibb's Rep.* 269. *Colyer v. Hutchings's exrs. ibid.* 404.

Where a man is to deliver property at a valuation, he is not bound to carry the property to the creditor, but the latter must receive it at the debtor's house. *Dandridge v. Harris*, 1 *Wash. Rep.* 422.

In the case of a tender of money it should be pleaded, and the money brought into Court. *Sheredine v. Gaul*, 2 *Dall. Rep.* 190.

If a man be bound to do a thing, he must either do it, or offer to do it; if no objections are made, he must shew that he made the tender in a regular manner; but it is not necessary if the other party, by his conduct, dispense with a regular tender by a previous refusal to accept it. *Blight v. Ashley et al.* 1 *Peters' Rep.* 24.

A party who has a right to object to a tender, is not precluded from availing himself of this objection, by the circumstance that his motive for objecting was, not the tender, but a desire on other grounds to get rid of the contract. *Decamp v. Feay*, 5 *Serg. & R. Rep.* 323.

The effect of a tender is not to extinguish the right of action, but only to preclude a claim for interest. *Raymond et al. v. Bearnard*, 12 *Johns. Rep.* 274.

If a legal tender is made of the money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the land is discharged from the mortgage, though the debt remains. *Jackson ex. d. Bowers v. Crafts*, 18 *Do.* 110.

A tender of a bond of indemnity, after action brought, is insufficient where indemnity is necessary to plaintiff's recovery. *Harper v. Hampton*, 1 *Har. & Johns. Rep.* 719.

If a vendor had not the title at the sale, and defends under the plea of tender, he must shew that he had acquired the title before the tender. *Burch v. Young*, 3 *Marsh. Rep.* 418.

So in another case the Court said a plea of tender should be accompanied with bringing the money into Court, otherwise the plea is a nullity, and it would seem that the plea should state the kind of money. *Downman v. Downman's exrs.* 1 *Wash. Rep.* 34. *Clafin v. Hawes*, 8 *Mass. Rep.* 261.

It seems however, that machines and other tools ponderous in their nature, need not be brought into Court by the defendant. *Shotwell v. Wendover*, 1 *Johns. Rep.* 64.

A tender must be strictly proved, therefore in an action on a promise to deliver a quantity of boards at a certain time and place, the defendant pleaded he had the boards at the time and place ready, &c. it being proved that boards of sufficient quantity and value were at the place and time, will not be sufficient, if the witness do not know to whom they belonged. *Cobb v. Williams*, 7 *Johns. Rep.* 24.

In a plea of tender of goods upon an obligation, they must be particularly described so that they may be identified. *Nichols v. Whiting*, 1 *Root's Rep.* 443.

A tender (if legal) vests the property in the party to whom the goods are tendered, therefore if the party to whom they are tendered, at first refuse to receive them, afterwards demand them, and they are not given up to him, he may bring an action of trover for such goods. *Rex v. Strong*, *ibid.* 55.

As upon a plea of tender, the money must by law accompany the plea; the defendant in a subsequent suit, may plead the tender of money into Court in the first suit,

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Tender.

- (1) *Goodland v. Blewitt*, 1 Campb. 477. to the plaintiff or an agent who was authorised to receive payment,(1) and had it with him to pay. If the plaintiff make no objection to receive it, the defendant should put it down for him, for holding it in a bag under his arm is not sufficient;(2) but if the plaintiff refuse to receive the money tendered, intending that more is due, he cannot afterwards object to the formality of the tender. Thus, though a person must regularly tender money, and not bank-notes,(3) and the exact sum without asking for change,(4) or a receipt;(5) yet, if when such informal tender is made, the creditor does not object to receive it on that account, but on account of more being due, he will not afterwards be permitted to object to it on the trial.(6) And even if the cash-notes of a country bank are tendered, and no objection is made on that account, the tender will be deemed sufficient.(7) So where the defendant's agent, having taken out his pocket-book, offered to pay the plaintiff's debt if he would go to a neighbouring public house, and the plaintiff refused, this was held a good tender.(8) But in all cases it should appear either that some money was produced, or that the creditor expressly said he would not receive it.(9)

- (2) *Vide B. N. B.* 151. But these are not the only replications that may be made to this plea; the plaintiff may reply a special demand by him, and refusal by the defendant to pay at any time, either before or subsequent to the time of the tender, for if the defendant has ever refused to pay the money, his tender will not avail him;(10)

- (3) *Wright v. Reed*, 3 T. Rep. 534. 2 B. & P. 526. and prove the payment to the clerk, which if found in the defendant's favor, will draw after it a judgment for the defendant. *Robinson v. Gaines*, 3 Call's Rep. 243.

- (4) *Black v. Smith*, Peak. Cas. 88. The advantage to defendant of the plea of tender, will be taken away by a subsequent demand from the plaintiff and a refusal by the defendant. *Rose v. Brown*, *Kirb. Rep.* 295.

- (5) *Cole v. Blake*, lb. 179. Sed vide *Glascoot v. Day*, 3 Esp. Cas. 48, and *Huxham v. Smith*, 2 Campb. 21. In *New York. Manny v. Harris*, 2 Johns. Rep. 24.

- (6) *See the above cases.* Whether in the protest of a bill of exchange, the protest will be evidence of the legality of the money tendered as payment of the bill. *Searight v. Calbraith et al.* 4 Dall. Rep. 327.

- (7) *Lockyer v. Jones*, Peak N. P. Cas. 3d ed. 239. *Vide Mumford v. Wright et al. Kirb. Rep.* 298, *Place v. Lyon*, *ibid.* 404, as to proof of a tender under particular Statutes. Et vide *Johnson v. Hocker*, 1 Dall. Rep. 406, in *Pennsylvania*.

- (8) *Reed v. Golding*, 2 M. & S. 86. The defendant may give in evidence a tender, under the plea of payment, in an action of debt on a bill of exchange, to extinguish the interest. *Skipwith v. Morton*, 2 Call's Rep. 277.

- (9) *Dickinson v. Shee*, 4 Esp. Cas. 67. In *Connecticut*, under their Statute, if the defendant, on being arrested, shew the officer property to levy his execution upon, which apparently is not sufficient to discharge it, such a tender will not make the officer a trespasser. *Gilbert v. Rider*, *Kirb. Rep.* 180.

- (10) *Giles v. Hart*, Salk. 622. 1 Ld. Ray. 254. S. C. So by the common law of that State, a tender after the day of payment, if properly pleaded, and pursued up, is a defence to the action. *Tracy v. Strong*, 2 Con. Rep. 659.

and for this reason a tender after the day of payment, in a bill of exchange, is no bar to the action.(1) If this demand and refusal be traversed, the issue will of course be on the plaintiff to prove it; and to support the issue on his part, it will be necessary for him to shew that the demand was of the sum tendered, for if the defendant tender 5*l.* the plaintiff cannot avoid the effect of it by afterwards demanding 10*l.*(2) The demand must also be made either by the plaintiff himself, or some one authorised to give a discharge for the money. Thus a demand by a clerk to the plaintiff's attorney, who had never seen the debtor before, will not be sufficient.(3)

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(1) Hume v. Peploe, 8 East, 168.

(2) Spyrbey v. Hyde, 1 Campb. 181.

(3) Coles v. Bell, 1 Camp. 478.

If the tender were, in point of fact, made after the commencement of the action, but before the exhibiting the bill, the plaintiff may in this, as in the former instances, shew the actual commencement of his action, by stating the writ in his replication; and the defendant may rejoin that there was then no cause of action, or that he tendered before the day on which the writ was sued out. On the first rejoinder it will be incumbent on the plaintiff to prove the time when the cause of action accrued; on the other, the defendant must shew the day on which he made his tender.(5)

(4) Johnson v. Mapletuft, 1 Lott. 227. Hume v. Peploe, 8 East, 168.

(5) Wood v. Newton, 1 Wils. 141.

I shall mention two defences more, which may be either specially pleaded in bar, or given in evidence on the *general issue*, and these are the *infancy* or *coverture* of the defendant at the time of the contract; but if a promise be made at the time a woman is sole, and she marry afterwards, this must be pleaded in abatement.(k)

Infancy.

Where a promissory note, not negotiable, was made payable in sixty days after date, and it fell due on Sunday, it was held that a tender on the following Monday was good. *Avery et al. v. Stewart et al.* 2 Do. 69.—A.M. Ed.

Infancy.

(k) Infancy may be given in evidence in an action of *assumpsit* under the general issue. *Stansbury v. Marks*, 4 Dall. Rep. 130.

The plea of the infancy of one of the defendants is personal, and cannot be taken advantage of by the other co-defendant. *Van Bramer et al. v. Cooper et al.* 2 Johns. Rep. 379. *S. P. Hurtness et al. v. Thompson et al.* 5 Johns. Rep. 160.

The infancy of the plaintiff is not a ground of *non suit* at the trial, but must be pleaded in abatement. *Schemerhorn v. Jenkins*, 7 Johns. Rep. 373. *Ex parte Scott*, 1 Cowen's Rep. 33.

It must be pleaded, and cannot be given in evidence on *non est factum*. *Van Valkenburgh v. Rouk*, 12 Johns. Rep. 337.

An infant may bring an action on a contract, but he must sue by guardian. *M. Clif- fin v. Stout*, 1 Coxe's Rep. 92.

To the plea of *infancy*, the plaintiff may reply, first, by denying the infancy.

Secondly. That the defendant ratified the promises after he came of age.

Lastly. That the things furnished were necessary for his degree. If the defendant give his infancy in evidence on the *general issue*, the plaintiff may prove either of these three facts in reply.

Borthwick v. Carruthers, 1 T. Rep. 648.

In the two first cases it is sufficient for the plaintiff, in the first instance, to prove a promise; and it is incumbent on the defendant to shew the time of his birth, for this fact cannot be supposed to be in the knowledge of the plaintiff; but if, upon a replication of a ratification after age, the defendant establish his nonage, at the time of the original contract, it is then incumbent on the plaintiff to prove an express promise to pay after he attained his age. A bare acknowledgment of the debt is not sufficient in this case, (1) as in the case of the Statute of Limitations, for the law protects an infant, and implies no promise further than for those things which are necessary for his sup-

(1) Lara v. Bud, Sitt. after H. T. 31 Geo. 3, M. S.

An infant may commit treason, and thus subject his estate to forfeiture. *Denn ex. d. Boyd v. Banta*, *ibid.* 266.

A sale by an infant accompanied by delivery, is good against third persons. *Johnson v. Packer*, 1 *Nott & M'Cord's Rep.* 1.

An infant is no more liable for a fraud in a contract in *Chancery* than at law. *Geer v. Hoovey*, 1 *Root's Rep.* 179. *Brown v. Dunham*, *ibid.* 272.

In *Chancery*, in a decree against infants, time will be given them to make objection after attaining their age. *Braxton v. Lee's admr.* 4 *H. & Munf. Rep.* 376. *S. P. Wilkinson's admr. v. Oliver*, *ibid.* 450.

The payee of a note given by an infant in the course of trade cannot enforce it against such infant. *Van Winkle v. Ketcham*, 3 *Caines' Rep.* 323. *Coleman & Caines' Cas. in Prac.* 503.

An infant will not even be held to bail for goods sold and delivered, not being necessities. *Pratt v. Strickland*, 1 *Browne's Rep.* 213. *See vide Clemson v. Bush*, 3 *Binn. Rep.* 413.

But an infant is bound by marriage articles or settlements, and such contracts will bind them when of full age. *Tabb et al. v. Archer et al.* 3 *H. & Munf. Rep.* 400.

As to an execution issuing against a minor who had defended in an action of ejectment by his guardian. *Vide Lane's les. v. Gover*, 1 *H. & M'Hen. Rep.* 459.

As to an infant's defending a suit by guardian. *Vide Knapp v. Crosby*, 1 *Mass. Rep.* 479. *Brown v. Chase*, 4 *Do.* 436.

An infant is personally liable to a suit for neglect of duty, as a member of a militia company; and the proceedings for the recovery of the penalty incurred are not *civiliter*, as upon a contract, but *criminaliter*, for an offence against law. *Winslow v. Anderson*, 4 *Mass. Rep.* 376. *Dyer v. Hunnewell*, 12 *Do.* 271.

If a person has entered into a contract while an infant, his executor or administrator may plead his infancy in bar of an action brought upon the contract. *Smith v. Mayo et al. exr.* 9 *Do.* 62. *Martin v. Same*, 10 *Do.* 137. *Jackson v. Same*, 11 *Do.* 147. *Hussey et al. v. Jewett*, 9 *Do.* 100.—AM. ED.

port. In this case, therefore, the payment of part of the debt after age, without any promise to pay the remainder, will not bind him to do so; (1) and if he promise to pay a part of the debt, it will bind him so far and no farther. (1) (2)

To support the replication of necessities, the plaintiff must prove the station and condition in life of the defendant, and that the things furnished for him were suitable and agreeable to that station; and if he fail in establishing this fact, the jury should find for the defendant; (3) but the Judge must leave the question to them, and cannot determine, as a mere question of law, that certain things are not necessities. (4) Every infant is chargeable for necessary victuals and clothing for himself, (5) his wife, (6) or lawful child; (7) and one bearing a captain's commission in the army has been held liable for a livery provided by his orders for his servant, for this is equally necessary for the honour and credit of his station. (8) But as the law acknowledges no discretion in an infant, it will not permit him to be charged by any contract not absolutely necessary for his existence; and, therefore, for cockades found for the soldiers, by order of the defendant in the last case, he was holden not to be liable. (9) (m) So he is not liable for goods provided him to sell again, though he keeps an open and public shop, for he has not discretion to carry on business; (10) and even money lent him to purchase necessities, unless actually so applied by him, is not recoverable; (11) and no action can be maintained against him on an account stated, though the particulars of such account were for necessities. (12)

On the part of the defendant, on this issue, it may be shewn, that he was provided by his parents or friends with things necessary for his condition; and, if that appear to be the case, whether known to the plaintiff or not, it is the bounden duty of a jury, though oftentimes unwillingly performed by them, to find a verdict for the defendant; for the law in favour of infants was wisely made to afford them protection at a time of life when they have not wisdom to protect themselves. (13)

(1) A note given by an infant becomes good by a promise to pay it, made after drawer of the note came of age. *Lawrence v. Gardner*, 1 Root's Rep. 477. S. P. *Alsop v. Todd*, 2 Do. 105

So in the case of a bond, though an infant be not bound by it, yet he will bind himself by a promise to pay it made after he came to full age. *Beverley's trustees v. Smith et al.* 1 Wash. Rep. 381—AM. ED.

(m) An infant alien cannot be naturalised on his own petition. *Le Forestiere's Case*, 2 Mass. Rep. 419.—AM. ED.

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Infancy.

(1) *Thrupp v. Fender*, M. S. Esp. 628, S. C.

(2) *Green v. Parker*, Abingdon S. Ass. 1755, cor. *Forster J.* M. S.

(3) *Bliss v. Palmer*, cor. *Abbott J.* Oxford Sum. Ass. 1816.

(4) *Madox v. Miller*, 1 M. & S. 378.

(5) *Vide Bul. N. P.* 154.

(6) *Ib.* 155.

(7) *Scott v. Nelson*, M. S. B. N. P. 155.

(8) *Hands v. Stan*, 3 T. Rep. 578.

(9) *Ibid.*

(10) *Green v. Parker*, sup. *Whittington v. Hill* Cro. J. 494.

(11) *Whywall v. Champion*, 2 Stra. 1088, but Mr. B. Clarke, in one case held otherwise, vide B. & P. 154.

(12) *B. N. P.* 154.

(13) *Truman v. Hurst*, 1 T. Rep. 40.

Bartlett v. Emery, *ib.* 42, n.

(13) *Ford v. Prothergill*, *Prake's Case*, 220 1 Esp. Cas. 211. S. C.

The defence of *coverture* is, in general, equally unpopular with that of *infancy*; both, it must be confessed, are attempts to avoid paying for that which the defendant has actually received; and in both cases, must the plaintiff sustain a loss, if he does not receive payment for the commodity with which he has parted, (n) The sense of justice, therefore, natural to the human mind, raises a prejudice against these pleas; but a little reflection will convince every one, that the law which gives them is wise, and beneficial to the public, though the individual may be sometimes injured by it. As the infant is not possessed of discretion to know what is beneficial for him or otherwise, so the married woman has neither property nor freedom wherewith to contract; both are equally under the dominion of her husband, and therefore the law prevents her from being accountable for her contracts. The evidence of this plea of course lies on the defendant. She must prove her marriage, which is generally done by an examined copy of the register, and proof of her identity, or by the evidence of some person present at the marriage; she must also prove that her husband was living at the time the debt was contracted. This is the ordinary evidence; but in one case, (1) where a lady was married in *France*, and the troubles in that country rendered it almost impossible to get any person

(1) *Lester v. Barry*, M. S. 1 Esp. 353. S. C.

Coverture.

(n) Coverture of plaintiff cannot be pleaded after verdict, or after report of referees. *Alexander admr. v. Fink*, 12 Johns. Rep. 218.

Coverture may be given in evidence on the plea of *non est factum*. *Van Valkenburgh v. Rouk*, 12 Johns. Rep. 337.

Coverture after suit brought, is a plea in abatement in *Pennsylvania*. *Wilson v. Hamilton*, 4 Serg. & R. Rep. 238.

Any agreement between husband and wife during coverture, is void. *Dibble v. Hutton*, 1 Day's Rep. 221.

So an endorsement on marriage articles, made after marriage by husband and wife, can be regarded neither as a part of the original contract, nor explanatory thereof. *Tabb et al. v. Archer et al.* 3 H. & Munf. Rep. 399.

A count charging husband and wife on a joint assumption, is bad. *Grasser v. Eckart*, 1 Bin. Rep. 575.

Whether the specific execution of an agreement of husband and wife concerning her land, will be enforced against her in Chancery? *Downey v. Hotchkiss*, 2 Day's Rep. 225.

A bond from the husband of a feme covert for her separate maintenance after a voluntary separation, is valid. *Page v. Colson*, 2 Mass. Rep. 159.

For any species of injury done to the wife, the husband may release the damages. *Southworth v. Packard*, 7 Do. 95.

The coverture of the plaintiff should be pleaded in abatement, and cannot be taken advantage of, on a motion for a nonsuit. *Newton v. Robinson*, Tayl. Rep. 72. S. P. *Surtell v. Brailsford*, 2 Bay's Rep. 353.—Am. Ev.

as a witness, who was present at the marriage, Lord KENYON held, that proof of her and her husband having been received as husband and wife by all her friends and relations here, was sufficient to support this plea, without calling any person who was present at the marriage.^(o) To this plea, the plaintiff may also reply, that the husband at the time of the contract had abjured the realm, or was transported ;⁽¹⁾ and where a *French* emigrant⁽¹⁾ 1 T. Rep. had left his wife in this country, and was himself resident in ^{8, 9.} another, Lord KENYON, at *Nisi Prius*, held, that this circumstance was tantamount to the state of banishment in a native, and that the wife was answerable as a *feme sole*.⁽²⁾ So if the⁽²⁾ Walford v. Duchess de wife of a foreigner, who is resident abroad, live here and trade Pienne, M. S. as a *feme sole*, she may be sued⁽³⁾ as such. And in all cases⁽⁴⁾ 2 Esp. 564. S. C. where the husband has been abroad above seven years, it will be incumbent on the defendant to prove that he was alive within⁽³⁾ De Gaillon v. L'Aigle, that time. It had been determined by some modern cases,⁽⁵⁾ 1 B. & P. 357. that if a wife, parted from her husband, with a separate maintenance, secured to her by deed, contracted debts, she might be⁽⁴⁾ Hopewell v. De Pons, sued on such contract : but in a late case, where the subject was 2 Campb. 113. fully considered, the old rule of law was re-established ; and it⁽⁵⁾ Corbet v. Poelnitz, 1 T. Rep. 5, &c. is now settled, that no agreement between a man and his wife can so far remove the legal disabilities of the latter, as to make her contract binding ;⁽⁶⁾ and so absolutely void is this contract,⁽⁶⁾ Marshall v. Rutton, 8 T. Rep. 845. that no promise made, after the death of the husband, can give validity to it,⁽⁷⁾ so as to maintain an action on the original promise ; though, if such original promise were founded on such⁽⁷⁾ Lloyd v. Lee, 1 Stra. 94. a consideration as imposed a moral obligation on her to perform it, it will be sufficient to support a count on the new promise made after the death of the husband.⁽⁸⁾

⁽⁸⁾ Lee v. Mugeridge, 5 Taunt. 36.

^(o) The wife of one who has been absent in the *East Indies*, six or seven years, having, during his absence, carried on business as a *feme sole*, still is not in the estimation of law, a *feme sole*. *The Commonwealth v. Collins*, 1 Mass. Rep. 116.

In *Pennsylvania*, there is a legislative provision, enabling a *feme covert* to set and trade as a *feme sole*. 1 Sm. L. 99.

What evidence of marriage is sufficient to entitle the party to alimony, Vide *Purcell v. Purcell*, 4 H. & Munf. Rep. 507.

On a petition for dower, co-habitation and having children, will furnish presumptive evidence of marriage. *Whitehead v. Church*, 2 Bayw. Rep. 3. Vide ante, p. 131. note (x)—AM. Ed.

CHAP. III.

OF THE EVIDENCE IN ACTIONS OF COVENANT.

Part II.
Non est
factum.

THE form of pleading in *covenant*, not allowing that latitude to a defendant which he is entitled to in the action of *assumpsit* the evidence which the plaintiff is called upon to give is more easily ascertained than in that form of action; for as the law has given no *general issue* in this action, which, when several facts are stated, denies the whole of the plaintiff's case; (a) and as we have before seen that facts which are not expressly denied are considered as admitted; it follows that, unless in the case of several pleas under the Statute of *Anne*, the evidence of the plaintiff is generally confined to a single fact.

The most common plea in the action of covenant is that of *non est factum*, whereby the defendant denies that the instrument, on which the action is founded, is his deed. (b) On this

(a) Covenant can be brought only on a sealed instrument. *Ludlum v. Wood*, 1 *Penning. Rep.* 55. Vide *Jasper's adms. v. Tooley's adms.* 2 *Hayw. Rep.* 339. *Ibid.* 351.—AM. ED.

(b) In *Massachusetts*, in an action of covenant, under the plea of *non est factum*, special matter will not be allowed to be given in evidence. *Kellogg v. Ingersoll*, 1 *Mass. Rep.* 5.

In *Connecticut*, (under a Statute) the defendant may give in evidence under the general plea, any thing which goes in avoidance of the bond. *Clark v. Bray, Kirk. Rep.* 237.

Under this plea, the defendant could not give in evidence that a deed was delivered as an escrow, but it must be specially pleaded. *Smallwood v. Clarke, Tazl. Rep.* 281.

Plea of acceptance in satisfaction from a third person or stranger, is not a good plea in covenant. *Clow v. Burst et al.* 6 *Johns. Rep.* 37.

In an action of covenant on a policy *under seal*, all special matter of defence must be pleaded. *Marine Ins. Co. v. Hodgson*, 6 *Cranch's Rep.* 206.

The plea of *performance with leave, &c.* in an action of covenant, is peculiar to *Pennsylvania*, and has been sanctioned by too long a usage to shake it. Under this plea, upon notice to the plaintiff without form, the defendant may give any thing in evidence which he might have pleaded. *Bender v. Fromberger*, 4 *Dall. Rep.* 436.

The plea of covenants performed, admits the execution of the instrument and supercedes the necessity of other proof, but it does not admit, that the adverse party had performed his agreement. *Neave v. Jenkins*, 2 *Yeates' Rep.* 107. Et vide *Barnett v. Crutcher*, 3 *Bibb. Rep.* 202.

On an issue of *quantum damnificatus*, ordered by a Court of Equity, for breach of the covenants in a deed, the Court will allow the defendant in that issue to give

plea, therefore, the plaintiff will be called upon to prove that the instrument was fairly executed, without fraud, and that the proper legal formalities were complied with; the mode of proving, which I have before had occasion to notice.

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Ante, 146.*

The defendant, of course, will be entitled, in his turn, to give any evidence which shews that it was not duly executed by him. If it be a forgery; or if he were a lunatic; (1) or intoxicated, and knew not what he did; (2) or, if being blind, or illiterate, the instrument was falsely read to him, it is not considered as his deed, (c) and, therefore, either of these facts may be given in evidence on the part of the defendant. But the circumstance of the deed being founded on an usurious or other corrupt consideration; (3) or that the party was an infant, or under duress at the time; (4) does not so wholly destroy the deed, as to be evidence on this issue. (d) In the case of a married woman, how-

(1) *Yates v. Boon*, 2 Stra. 1104.

(2) *Cole v. Robins*, B. N. P. 172.

(3) and (4) *Bul. N. P.* 172.

in evidence, in diminution of the damages, the value of the land which passed to the vendee, by the deed, over and above the quantity expressed in the deed. *Thomas v. Perry*, 1 *Peter's Rep.* 49.

On the issue of *covenants performed*, evidence to shew that the plaintiff accepted the work performed, differently from that stipulated for, is not admissible. *Wathan v. Pennebaker*, 3 *Bibb. Rep.* 99.—AM. ED.

* If the plaintiff made protest, he must produce the deed, and cannot, on such a declaration, give evidence of its destruction, except in the case of an enrolment under the Statute of *Hen. 8*, in which case the Stat. 13 *Ann. c. 18*, under certain circumstances makes a copy of the enrolment evidence. Vide ante, 165. In all other cases of loss, destruction or possession of the defendant, the plaintiff must state the circumstance specially in the declaration. *Smith and another v. Woodford*, 4 *East's Rep.* 585.

(c) But it seems that the intoxication must have arisen by the procurement of the plaintiff. *Curtis v. Hall*, 1 *South's Rep.* 361.

Or that a different instrument was signed instead of the one the defendant supposed he was executing. *Van Valkenburg v. Rouk*, 12 *Johns. Rep.* 387. Et vide *Moore v. Carpenter*, *Cameron Et Norw. Rep.* 553.—AM. ED.

(d) A specialty will be vacated in Chancery, in favour of the representatives of a party, on the ground that he was drunk when the party executed it, though such drunkenness were not occasioned by the procurement of the party. *Wigglesworth v. Steers et al.* 1 *H. Et Munf. Rep.* 69.

So in an action brought on a bond, executed by the obligor, when drunk, for a debt he did not owe; judgment will be given for the defendant. *King's exr. v. Bryant's exr.* 2 *Hayw. Rep.* 394.

The obligor must perform the condition of a bond, if lawful, or incur the penalty. *Holbridge v. Allin*, 2 *Root's Rep.* 139. Vide ante, p. 402. note (s)

Failure of consideration, furnishes a good ground of defence, against a bond given for the consideration money of a tract of land. *Thompson v. M^c Cord*, 2 *Bay's Rep.* 76. *S. P.* *State v. Gallard et al. ibid.* 11. *Gray v. Handkinson*, 1 *Bay's Rep.* 378.

Though an infant, at the time of executing a bond, fraudulently allege himself to be of full age; yet the bond will be held to be void at law. *Conroe v. Birdsell*, 1 *Johns. Cas.* 127.

Where an infant bargains and sells land to *A.* and after coming of age, sells the same land to *B.* this is a revocation of the former grant, admitting that the first deed was voidable only, and not void. *Jackson ex d. Brayton et al. v. Birchlin*, 14 *Johns. Rep.* 124.

A deed executed by a minor is not binding. *Thompson v. Bullock*, 1 *Bay's Rep.* 364.

Yet a minor will be bound by a jointure given her in bar of dower by marriage articles, though she was under age. 1 *H. & M. Hen. Rep.* 568.

S. P. in Virginia. Tabb et al. v. Archer et al. 3 *H. & Munf. Rep.* 399.

A deed made during minority, will be made good by the party confirming it by parcel declarations, after he arrives at age. *Houser v. Reynolds*, 1 *Hayw. Rep.* 143.

But it must be made deliberately, and with the knowledge that he is not liable by law. *Smith v. Mayo et al. exrs.* 9 *Mass. Rep.* 62. *Hussey et al. v. Jewett exr.* *ibid.* 100.

Vide *Buckner et al. v. Smith*, 1 *Wash. Rep.* 381. Vide ante, p. 433. note (k)

Where the plaintiff and defendant having had a quarrel, the plaintiff went to the defendant's house afterwards, in the night, with an armed party, and proposing a settlement of the difference, (though no actual threats were made use of) and a note given with security, in consequence of this proposal, it was held, the note was given under duress, and was void, both as to the principal and security. *Evans v. Huey et al.* 1 *Bay's Rep.* 13.

In an action on a bond, evidence cannot be given to prove that the son of one of the obligors was in duress, and that another of them executed the bond to procure his release. *Simms v. Barefoot's exrs.* 2 *Hayw. Rep.* 402.

Duress of goods, under some circumstances, will avoid a man's note or bond. *Saunders v. Jennings et al.* 1 *Bay's Rep.* 470. *The Inhabitants of Worcester v. Eaton*, 11 *Mass. Rep.* 379.

Duress of goods or negroes, is a good plea to a bond given for their release, under hard and pressing circumstances, which are to be considered by the jury. *Collins v. Westbury et al.* 2 *Bay's Rep.* 211.

One obligor cannot plead that the bond was obtained of his co-obligor by duress, except in case of a bond taken by a Sheriff, from one whom he has no right to detain in custody. *Thompson v. Lockwood*, 15 *Johns. Rep.* 256.

It is a general rule, that imprisonment by order of law is not duress. *Watkins v. Baird*, 6 *Mass. Rep.* 506.

Will a Court of Equity enforce a voluntary covenant to convey land? *Browne v. Browne et al.* 1 *Har. & Johns. Rep.* 430.

In *Kentucky*, it has been ruled that menaces, which induce a fear of loss of life, of member, of mayhem, or of imprisonment, may avoid a deed; but menaces, to commit a battery, to burn a house, or spoil goods, will not be sufficient. *Edwards v. Handley, Hardin's Rep.* 602.

Duress and imprisonment will avoid a receipt. *Candy v. Twichell*, 2 *Root's Rep.* 123.

A covenant to keep the premises in good order, will be vacated by the premises being burnt by the common enemies of the country. *Pollard v. Shaffer*, 1 *Dalk. Rep.* 210.

But not if accidentally destroyed by fire. *Combs v. Fisher*, 3 *Bibb's Rep.* 51. *Hallett v. Wythe*, 3 *Johns. Rep.* 44.

Where a lessee covenants to keep the demised premises in repair, and at the determination of the lease, to surrender them in as good a condition as they were at the date of the lease; if the buildings are destroyed by fire during the term, without the default of the tenant, he will be bound to re-build them. *Philips v. Stevens*, 16 *Mass. Rep.* 238.—*Am. Ed.*

advantage of on *non est factum*.(1)(e) In like manner as any improper conduct, at the time of the execution of the instrument, may be given in evidence on this plea, so may any alteration whatever made by the plaintiff, or by another person, in a material part of the deed since; for these avoid the deed, and shew that it does not remain so at the time of plea pleaded.(2)(f) So if the seal be broken off, with a view of cancelling the deed, the defendant may avail himself of it on this plea; (1) *Ibid.* (2) *Piggot's Case*, 11 Co. 277.

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(f) A bond given by a feme covert, is absolutely void, even though she be a feme sole trader, unless she be specially stated to be one, in the pleadings, when she can bind herself, by a legislature provision of the State. *Wallace v. Rippon*, 2 Bay's Rep. 112.—Am. Ed.

(e) If a bond be executed jointly and severally by three, and an alteration be made in it by the consent of two of the obligors in the absence of the third, and afterwards the seal and signature of the third be erased by the obligee without the consent of the others, the bond becomes void. *Dewey v. Bradbury*, 1 Tyl. Rep. 186.

An interlineation, if made after the execution of a deed, will avoid it, though in an immaterial part. *Morris's Les. v. Vanderen*, 1 Dall. Rep. 67.

A material erasure or interlineation, not shown to have been made before its execution, is sufficient to avoid it, on the plea of *non est factum*, and the presumption is, that it was made afterwards. *Preest v. Gratz*, 1 Peters' Rep. 369. *Smith v. Crooker et al* 5 Mass. Rep. 538. *Hunt adm v. Adams*, 6 De. 519. *Hutch et ux. et al. v. Hatch et al.* 2 De. 307.

There is a difference between contracts, or bonds, and deeds of conveyance of land, as to the effect of alterations made in them. *Barrett v. Thorndike*, 1 Greenl. Rep. 72.

Quere, Do material alterations in a deed by a stranger, render it void. *Jackson ex. d. Malin v. Malin*, 15 Johns. Rep. 297.

If a specialty be lost, it must be declared on as such, and the loss alleged in the declaration when oyer will not be granted. *Kelley v. Riggs*, 2 Root's Rep. 126. *S. P. Church v. Flowers*, *ibid.* 144. *Paddock v. Higgins*, *ibid.* 482.

When the breach of a covenant is specially assigned and the proof of it alleged to be by deeds and records, they must be shewn on oyer. *Wilford v. Rose*, 2 Root's Rep. 172.

It is no excuse on a motion for oyer that the writing is lost, but the loss should be set out in the declaration or plea. *Branch v. Riley*, 1 Root's Rep. 541.

But it has been ruled in *Virginia*, that the copy of a deed, of which oyer cannot be demanded, may be given in evidence, if the original be lost; but if oyer be demanded, the obligee must resort to equity for relief. *Taylor v. Peyton*, 1 Wash. Rep. 324.

Where the deed is not merely the inducement, but the foundation of the action, or where the right of action is not created by operation of law but by the act of the party, the plaintiff must make in his declaration a profert of the obligation or other instrument embracing the contract. *Austin v. Dills*, 1 Tyl. Rep. 308.

Though profert of a deed be made if oyer be not prayed, the deed will not be considered on record. *Bender v. Fromberger*, 4 Dall. Rep. 436.

In an action of debt, profert was not made of the deed, on which it was founded, and it was held fatal after judgment by default. *Scott v. Curd*, *Hardin's Rep.* 64.

Whether if there be no profert of the deed, and the defendant takes oyer, the defendant can take advantage of a variance by demurrer. *Macon v. Crump*, 1 Call's Rep. 575. *Vide King v. Bryant*, 2 Hayw. Rep. 594.—Am. Ed.

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(1) Vide Bul.
N. P. 172.

(2) Michael
v. Stockwith,
Cro. E. 120.

but if the seal were broken by accident, and the plaintiff prove this fact, it still continues an existing instrument ;(1) and, if the aleration has been made after the plea was pleaded, this does not support the plea.(2)

If the declaration contain different averments, and the defendant only plead *non est factum*, the other facts cannot be controverted; nor will the plaintiff be under any necessity of proving them, further than may be sufficient to ascertain his damages.

When the defendant does not plead *non est factum*, but traverses some other fact mentioned in the declaration, the evidence will be confined to the fact so traversed, and the *onus* will lie on that party who makes the affirmative. Thus, if a landlord sue his tenant, and aver that he ploughed up meadow land, &c. contrary to his covenant, and the tenant traverse this fact, the plaintiff must begin with evidence to prove it; but if the defendant, in an action on a covenant to pay a sum of money, plead that he paid it according to the covenant, the plaintiff is not obliged to give any evidence, but the defendant must prove his plea of payment.(g)

Assignment of Breaches.

(g) In covenant, the general rule of assigning a breach is to negative the words of the original covenant if it be sufficient, if not, to assign it specially. *Marston v. Hobbs*, 2 *Mass. Rep.* 433. *S. P. Treadwell v. Steele*, 3 *Caines' Rep.* 169. *Hughes v. Miller*, 5 *Johns. Rep.* 168. *Bender v. Fromberger*, 4 *Dall. Rep.* 436. *Craghill et al. v. Page*, 2 *H. & Munf. Rep.* 446. *Winslow v. The Commonwealth*, *ibid.* 459. *Dougherty v. Glen*, *Harlin's Rep.* 391.

An assignment of breaches, to be sufficient, must be in the words of the covenant, or in words of equal import. *King v. Rochester*, 3 *Marsh. Rep.* 928. *Hord v. Trimble*, *ibid.* 534.

When a party declares in substance on a written contract, he is not obliged to set forth the express words of the contract in his declaration. *Morton v. Wells*, 1 *Tyl. Rep.* 384.

In an action on a probate bond, the breach must be positively and directly assigned. *Fitch v. Lothrop*, 1 *Root's Rep.* 88.

Covenants are to be construed according to their spirit and intent, and a breach so assigned will be held good. *Quackenboss v. Lansing*, 6 *Johns. Rep.* 49. *S. P. Buster's exr. v. Wallace*, 4 *H. & Munf. Rep.* 82.

A covenant to convey the title, means the legal estate in fee, free from all valid claims, liens, or encumbrances whatever. *Jones v. Gardner*, 10 *Johns. Rep.* 266. Et vide *Clute v. Robison*, 2 *Do.* 595.

If a covenant be alleged in the narr. to have been made by the defendant, his heirs, executors, and administrators, but the covenant does not mention heirs, the variance is not material. *Jordan v. Cooper et al.* 3 *Serg. & R. Rep.* 564.

It is sufficient in an action of covenant, if the plaintiff set forth as much of the writing declared on as will shew his title. *Macon v. Crump*, 1 *Call's Rep.* 587.

In an action on a covenant by several persons, it may be taken distinctively, though there be no express words of severalty. *Ernst v. Bartle et al.* 1 *Johns. Cas.* 319.

The action of covenant is frequently brought by or against an assignee of a reversion or term, and if the plaintiff have the whole estate, though only in part of the premises in respect of which the covenant was made, he may maintain the action. (1)

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(1) Campbell
v. Lewis, 3 B.
& A. 392.

If a breach be badly assigned, it will be aided after verdict for the plaintiff, on an issue joined on the plea that the defendant had not broken his covenant. *Buster's exrs. v. Wallace*, 4 H. & Munf. Rep. 82.

An assignment of a breach, commencing with "whereas," &c. and continuing by way of recital, without any direct averment, will be fatal. *Syme v. Griffin*, *ibid.* 277.

In an action of covenant it was held that a plea of acceptance of satisfaction by the plaintiff from a third person or stranger would be bad. *Claw v. Borst et al.* 6 Johns. Rep. 37.

In an action of covenant, where some of the breaches are well assigned and some not, and the defendant demurs to the whole declaration, the plaintiff will have judgment for the whole breaches that are well assigned. *Adams v. Willoughby*, *ibid.* 65. Vide *Henderson v. Hepburn*, 2 Call's Rep. 232.

Mutual Covenants.

In a deed containing express covenants, there can be no implied covenants, or covenants in law, which are contradictory to the express covenants; but there may be implied covenants, which are consistent with those expressed in the deed. *Gates v. Caldwell et al. exrs.* 7 Mass. Rep. 68. *Sumner admr. v. Williams et al.* 8 Do. 201.

When there are mutual covenants to perform certain things at one and the same time, and the one is the consideration of the other, they are concurrent acts, and neither party can have an action without having performed or tendered a performance of his part. *Leverett v. Bellamy*, 1 Root's Rep. 169. *S. P. Cassell v. Cooke*, 8 Serg. & R. Rep. 268. *Pottard v. McClain*, 3 Marsh. Rep. 25.

In mutual covenants, the payment or performance by one party raises an obligation on the other party to perform, without a demand, his covenant. *Shackelford v. Barrow*, 2 Bay's Rep. 91.

Where by the terms of a contract, one party is to execute a deed to the other, precedent to a duty to be performed by the latter, it is sufficient in an action by the former for the non-performance of that duty to state that he has made out and tendered such a deed as the contract contemplated, without reciting the deed in his *verbis*. *Nichols v. Blakeslee*, 2 Day's Rep. 218.

The non-performance by the plaintiff of a precedent duty may be relied upon as a defence to an action for not complying with a covenant entered into by the defendant. *Bulkley v. Brainard*, 2 Root's Rep. 5.

An averment of "being ready, prepared and offering to execute a conveyance according, &c. but that the defendant did not attend, and has refused," is a sufficient offer to perform by the plaintiff. *Miller v. Drake*, 1 Caines' Rep. 45. *Ellington et al. v. Vanderlyn*, 4 Johns. Rep. 237.

Independent Covenants.

Vide *Barruso v. Madan*, 2 Johns. Rep. 145. *Seers v. Fowler*, *ibid.* 272. *Havens v. Bush*, *ibid.* 387. *Wilcox v. Ten Eyck*, 5 Do. 78. *Cunningham et al. v. Morrell*, 10 Do. 203.

Dependant Covenants.

Vide *Green v. Reynolds*, 2 Johns. Rep. 207. *McCall v. Welsh*, 3 Bibb. Rep. 289. *Jones v. Gardner*, 10 Johns. Rep. 266.

In cases where the assignee is plaintiff, it is necessary for him to set out the title of the original lessor, so as to shew a reversion in himself; and though where the original lessor is him-

Where there are mutual *parol promises*, one being the consideration of the other; each gives a right of action, and the plaintiff need not aver a performance on his part. *Hancock v. Vaxter, Hard. Rep. 510.*

Covenant of seizin, quiet possession, &c.

No action will lie on covenant of *general warranty of title* till an eviction. *Emerson v. The Proprietors of land in Minot, 1 Mass. Rep. 464.*

The covenant of warranty in a deed cannot be broken, but by an eviction or ouster by some title paramount to the grantors. *Twambly v. Henley, 4 Mass. Rep. 441. Murston v. Hobbs, 2 Do. 433. Bearce v. Jackson admr. 4 Do. 408. Prescott v. Trueman, ibid. 627.*

Eviction is sometimes construed by Courts as synonymous with *ouster*. *Hamilton v. Cuth et al. exrs. 4 Mass. Rep. 349.*

One in the possession of land, claiming to hold it in fee simple, is sufficiently seized to enable him to convey; and if he warrant the land, no action will lie against him on his covenant of warranty until an eviction of the grantee or his assigns by a paramount title. *Bearce v. Jackson, 4 Mass. Rep. 408. Et vide Marston v. Hobbs, 2 Do. 433.*

In an action on a covenant of *seizin*, the plaintiff must not only shew the defendant was not seized, but who was seized. *Welford v. Rose, 2 Root's Rep. 14.*

A declaration on a covenant of *seizin* will be supported, though it should set forth a covenant of *warranty of title*. *Seymour v. Ensign, 1 Root's Rep. 210.*

In *New York* it has been decided, that an action on a covenant of *warranty for peaceable possession* cannot be maintained, until there has been an eviction or actual ouster by a paramount lawful title. *Walbron v. M^c Carty, 3 Johns. Rep. 464.*

So in a later case, a covenant for *quiet enjoyment* was held to extend only to the possession and not to the title, and therefore is not broken unless there be an eviction of the covenantee, or an actual disturbance of his possession. *Kortz v. Carpenter, 5 Johns. Rep. 190.*

In *New Jersey* it has been ruled, that to maintain an action on a covenant of *seizin*, it is not necessary to prove an *eviction*, nor an *offer to restore the possession*. *Lot v. Thomas, Pennung. Rep. 407.*

In the Supreme Court of the *United States* it has been ruled, that in an action brought on a covenant of *seizin*, it is not necessary to maintain the action that the plaintiff should have been evicted. *Pollard et al. v. Dwight et al. 4 Cranch's Rep. 421.*

In declaring for the breach of a covenant *quiet enjoyment*, it must be alleged that the plaintiff was evicted by one having a lawful title and by process of law. *Greenby et al. v. Wilcocks, 2 Johns. Rep. 1. S. P. Folliard v. Wallace et al. ibid. 395. Kent v. Welch, 7 Do. 258. Sedgwick v. Hollenback, ibid. 376. Clarke v. M^c Anulty, 3 Serg. & R. Rep. 364.*

In an action to recover the price of lands, a failure of title as proving a want of consideration, may be given in evidence by *parol testimony*, elder grants, &c. before an eviction. *Hunt v. Lewis, 1 Bay's Rep. 161.*

The defendant conveyed certain land to the plaintiff by deed with a covenant of *seizin*; the plaintiff afterwards, re-conveyed, (before any damage had accrued to plaintiff,) to the defendant; it was held such re-conveyance did not operate as an extinguishment of the original covenant of *seizin* by the defendant. *Bennett v. Irwin, 3 Johns. Rep. 363.*

In an action on a covenant of *seizin* contained in a deed, the defendant is not al-

self plaintiff, such title is wholly immaterial, and cannot, if set out, be traversed, it is otherwise in the case of his assignee. But though the defendant may traverse the title in this case,

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lowed to give in evidence a title acquired by him, the defendant, since the bringing of the action; but the rights of the parties must be determined according to their existence and extent at the time when the action was commenced. *Morris v. Phelps*, 5 Johns. Rep. 49.

In *Massachusetts*, if the grantor in his deed, covenant that he has a good right to convey when in fact he has no such right, such covenant is broken immediately on executing the deed. *Bickford v. Page*, 2 Mass. Rep. 455. *Marston v. Hobbs*, 2 Mass. Rep. 433. *Carwell v. Wendell*, 4 Do. 108. *Twambly v. Henley*, *ibid.* 441. *Greenby et al. v. Wilcocks*, 2 Johns. Rep. 1. *Hamilton et al. v. Wilson*, 4 Do. 72.

But it is not broken, if the grantor were in fact seized, either by a wrong or defeasible title. *Marston v. Hobbs*, 2 Mass. Rep. 433. *Bearce v. Jackson*, *admr.* 4 Do. 408. *Twambly v. Henley*, *ibid.* 441. *Prescott v. Trueman*, *ibid.* 267.

So in *New York*, in an action on a breach of covenant of seizure in a deed, it was held that there being a failure of title, the covenant was broken as soon as it was made, and a perfect right of action thereon descended to the personal representatives of the grantee. *Hamilton et al. v. Wilson*, 4 Johns. Rep. 72. *Vide* *Lot v. Thomas*, *Penning*, Rep. 407.

Measure of damages on breach of Covenant, &c.

In *Massachusetts*, in an action founded on a breach of covenant of a good right and full power to sell, the measure of damages will be the consideration paid and interest thereon. *Bickford v. Page*, 2 Mass. Rep. 455. *Marston v. Hobbs*, *ibid.* 433. *Carwell v. Wendell*, 4 Do. 108. *Summer admr. v. Williams et al.* 8 Do. 162. *Nicholls v. Walter et al. exrs.* *ibid.* 243. *Harris et al. v. Newell*, 8 Do. 262. *Le-land v. Stone*, 10 Do. 459.

In another case in an action on a covenant of *seizin and warranty of lands*, the measure of damages was held to be the value of the lands at the time of eviction. *Gere v. Brazier*, 3 Mass. Rep. 523. *Bigelow v. Jones*, *admr.* 4 Do. 512.

But in a later case in the same State, in an action founded on a covenant of *seizin*, the damages were declared to be the value of the land at the time of the conveyance and interest thereon to the time of judgment. *Carwell v. Wendell*, 4 Do. 108. *Sed vide* *Bigelow v. Jones admr.* *ibid.* 512.

In *Connecticut*, in an old case, in an action founded on a covenant of *seizin* contained in a deed, the measure of damages were the consideration of the deed; but in an action founded on a covenant of *warranty* the measure will be the value of the land at the time of eviction. *Horsford v. Wright*, *Kirb.* Rep. 3.

In a more modern case, in an action on a covenant of *seizin* in the sale of unimproved land, the damages given were the consideration paid for the land and interest thereon; but in the sale of improved land, the consideration paid, without the interest. *Castle v. Pierce*, 2 Root's Rep. 294.

Where there had been several conveyances of land with covenants of warranty, and an eviction of the last covenantee, an intermediate covenantee who has not been damnified, is not entitled to recover against a prior covenantor. *Booth v. Starr et al.* 1 Con. Rep. 244.

The costs which the vendee was put to, in defending the action wherein he was evicted, must make part of the damages, in an action by him against the vendor, for a breach of covenant. *Waldo v. Long*, 7 Johns. Rep. 173. *Et vide* *Cox's heirs v. Strode*, 2 Bibb's Rep. 276.

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(1) Carwick v.
Blagrav.,
1 Brod. &
Bing. 531.

(2) Doe v.
Parker, cor.
Lord Kenyon,
Stafford Sum.
Ass. 1788.

(3) Holford
v. Hatch,
Doug. 138.
Vide also
Hare v. Cator,
Cowp. 766.

yet the plaintiff is not obliged to prove it precisely as laid, if he shews a title of the same kind, and that the lessor had a reversion which is assigned to him, that is sufficient.(1) If the conveyance to the plaintiff be traversed, it will be incumbent on him either to prove the conveyance duly and regularly made, or else a payment of rent to him by the defendant.*(2) But in the case of a defendant who is sued as assignee of a term, it will be sufficient on the part of the plaintiff, to prove that the defendant is in actual possession, or pays the rent. This is, however, only *prima facie* evidence, and does not estop the defendant from shewing that the title is in another, under whom he holds; and therefore, in one case, where a defendant, who was sued as assignee of all the estate of the lessee, traversed that fact, and proved that he was under-tenant only, (a reversion of a day being left in the original lessee, it was holden that the action was not maintainable.(3) In another case lessees for lives granted all their estate to a third person for ninety-nine years, if the lessees should so long live; and here also it was holden, that such grant being no assignment of the freehold, the

* The case of *Doe v. Parker*, was an *ejectment* brought by the lessor of the plaintiff to put an end to a lease granted by one Mrs. *Parkes* to the defendant for twenty-one years, determinable at the end of fourteen years by Mrs. *Parkes*, or her assigns, on giving six months previous notice to quit. The leases being put in, and a notice by the lessor of the plaintiff being proved, it was objected by the defendant's counsel, that the lessor of the plaintiff should produce some deed of assignment from Mrs. *Parkes*. But it appearing that the defendant had paid rent to him, Lord Kenyon said, that was sufficient evidence of an assignment, and of the defendant being his tenant. Vide ante,

In *New York*, in an action founded on a covenant of *ownership seizin*, power to sell, and for *peaceable enjoyment*, if the vendee be evicted he can only recover the value of the land at the time of the purchase with interest for so long a time as he pays *mesne profits*, and the costs of the *ejectment* that may be brought against him, but not those of the action for *mesne profits*. *Staats v. exrs. of Ten Eyck*, 3 *Caines' Rep.* 111.

In another case, being an action founded on a covenant of *seizin*, and for *quiet enjoyment* in a deed, the plaintiff can recover only the consideration money paid, with interest and the costs of *ejectment*. *Pitcher v. Livingston*, 4 *Johns. Rep.* 1.

In such a case, the plaintiff cannot recover damages for the improvement he has made, nor for the increased value of the land. *ibid.*

In *Pennsylvania*, in an action founded on a covenant of warranty of title, in case of eviction, the measure of damages will be the price of the lands at the time of the sale, and not the improved value of the land. *Bender v. Fromberger*, 4 *Dall. Rep.* 441.

In *Virginia*, where lands are sold with warranty, and the vendee is evicted, the measure of damages will be the purchase money, with interest and costs, and not the value of the land at the time of eviction. *Lowther v. The Commonwealth*, 1 *H. & Munf. Rep.* 901 Vide *Mills v. Bell*, 3 *Call's Rep.* 390.

In *South Carolina*, the value of the lands, at the time of eviction, is the measure

grantee could not be sued by the original lessor as the assignee of the estate.(1) So in a case(2) at *Nisi Prius*, where the defendant proved that her husband, (the original lessee,) by his will left his freehold messuages, and also his personal estate, to two persons, in trust to permit the defendant to receive and take the rents, issues, and profits of his real estate, and the interest of the personal estate during her widowhood; and after her death, or second marriage, in trust to sell, &c. and in case of such marriage to pay her an annuity of 50*l.* and made those persons executors; Mr. J. LAWRENCE held the defendant not chargeable as assignee, although she had always continued in possession of the premises; and in a still later case it was determined, that a devise of the mere equity of redemption of a mortgaged term cannot be so charged in a Court of Law.(3) Whether a mortgagee taking by way of assignment the whole term, but who never entered into possession of the premises, can be so charged, must be considered as a doubtful question; in one case it was held that he could not,(4) and though this decision has been doubted by the highest authority,(5) it has never been expressly over-ruled.(6) Assignees of a bankrupt cannot be charged as assignees of a term which was in him, merely upon the commissioner's assignment to them.(7) To support an action against them as such, it must also be proved that they accepted the assignment of the premises, and possessed themselves of them. Merely putting the premises up to auction, for the purpose of ascertaining their value, is not such an exercise of right as will make them liable to the action.(8) But if on being applied to for the key, the assignee answers that he will keep it till the end of the quarter to see if he can let the premises, this act will make him liable as assignee of the term; for though he may refuse it at first, he cannot take it in part, and afterwards reject it when he finds it will not answer.(9)(h) So where on a bank-

Chap. III.
By or against
assignee.

(1) Earl of
Derby v. Tay-
lor, 1 East.
502.

(2) Averill v.
Holmes,
Worcester
Sum. Ass.
1805.

(3) Mayor of
Carlisle v.
Blamire,
8 East, 487.

(4) Easton v.
Jacques,
Doug. 455.

(5) Walker v.
Reeves, cited
Doug. 461.
Westerdale v.

Dale, 7 T.
Rep. 312.
Stone v.
Evans, M. S.
also cited
7 East, 341.

(6) Vide 8
East, 497.

(7) Boardillon
v. Dalton,
Peake's Cas.
238.

(8) Turner v.
Richardson,
7 East, 335.

(9) Brome v.
Robinson, cor.
Kenyon C. J.

of damages in an action of covenant, brought for a breach of warranty, and not the consideration money at the time of purchase. *Liber v. The exr. of Parsons*, 1 Bay's Rep. 19. *Guerard v. Riners*, *ibid.* 265.

In *Kentucky*, if land, conveyed by general warranty, be lost, its value will be the measure of compensation. *Harland v. Eastland*, *Hard. Rep.* 590. Et vide *Cox's heirs v. Strobe*, 2 *Bibb's Rep.* 276.

If, on a conveyance of lands, with a covenant of *seizin*, part of the land become lost by superior title, the measure of damages will be the value of the *part* lost, taken in proportion to the price for the *whole*. *Morris v. Phelps*, 5 *Johns. Rep.* 49.—*AM. Ed.*

(h) If a covenant be broken, it becomes a *chase in action*, and cannot be assigned so as to enable the assignee to bring an action in his own name. *Greenby et al. v. Wilcocks*, 2 *Johns. Rep.* 1.

Part. II.
By or against
assigner.

ruptcy happening in *June*, and an assignment being made in *July*, the assignees actually took possession and continued in possession till march, when they put up the lease, fixtures, and stock, but failing to sell the lease, returnyd the keys to the landlord; it was held, that by these acts they had made themselves liable as assignees of the term.(1)

(1) *Hanson v. Stevemann*,
1 B. & A. 303.

A covenant to run with the land, and bind the assignee, must relate to the thing granted, and the act covenanted to be done must concern the demised property. *Nesbit v. Nesbit*, Rep. in Co. of Conf 318. *Tayl. Rep.* 82.

Covenants running with land, bind the assignee, whether he be named or not such, to keep the premises in good order, &c. *Pollard v. Schaafer*, 1 *Dall. Rep.* 211.

If a lessee covenants to pay rent clear of all charges and assessments whatever, it is a covenant running with the land and binding upon the assignee. *Sandwich v. Desilver*, 1 *Browne's Rep.* 221.

It lies against ex-cutors and administrators of a grantee in fee, where the grantee covenants for himself his executors, &c. to pay a rent in fee, although the land goes to the heirs. *Exrs. of Van Rensselaer v. exrs. of Patner*, 2 *Johns. Cas.* 17.

Where *A.* gave bond to *B.* to rebuild, &c. if the wall gave way, &c. and the walls did give way, and *B.* sold the house to *C.* and assigned also the bond, who gave notice to *A.* and requested him to re-build, &c. it was held the notice from the assignee *C.* was sufficient. *Van Vechten v. Graves*, 4 *Johns. Rep.* 403.

Where the lessee expressly covenants for the payment of rent, he assigns over the premises, and the lessee receives rent from the assignee, still an action of covenant will lie, brought by the lessor against the lessee, for subsequent rent due from the demised premises. *Kunkle v. Wynick*, 1 *Dall. Rep.* 305.—*Am. Ed.*

CHAP. IV.

OF THE EVIDENCE IN THE ACTION OF DEBT.

SECTION I.

On Specialties.

THE action of *debt* is founded either on contract, or on a duty raised by operation of law. The former may be either by specialty, or on a simple contract. In the case of an action founded wholly on a specialty, little more need be said, than to refer to what has been already observed on the action of *covenant*; for in this case, as in that, the rules of pleading require that some one fact only shall be traversed. (a) The only plea which denies the contract itself, is the same as in that action, viz. the plea of *non est factum*; which in cases of bonds for payment of money, puts the plaintiff on proving nothing more than the existence of the deed. Any thing which goes to avoid it, or to

Ch. IV. s. 1.
Non est
factum.

(a) Debts for which an action of debt may be brought at common law, may be classed under four general heads: 1st. Judgments obtained in a Court of record on a suit. 2d. Specialties acknowledged to be entered of record. 3d. Specialties indented or not indented. 4th. Contracts without specialties, either express or implied. Per M'KEAN C. J. *Respublica v. Le Case et al.* 2 Dall. Rep. 118. 1 Yeates' Rep. 55.

It seems that wherever *indebitatus assumpsit* lies, debt may be brought. *United States v. Colt*, 1 Peters' Rep. 149.

It lies to recover the annual interest of money payable on bond, when the principal is not due. *Sparks v. Garrigues et al.* 1 Binn. Rep. 152.

Though an instrument, taken in the Admiralty be void as a stipulation, yet it may be good as a contract, on which an action of *debt* or *special assumpsit* would lie. *Le Case v. The State of Pennsylvania, &c.* 2 Dall. Rep. 118. 1 Yeates' Rep. 55. S. C. in High Court of Errors, *Addis. Rep.* 54.

So an action of *debt* will lie on a defective forthcoming bond, even after an unsuccessful motion has been made upon it. *Hewlett v. Chamberlayne*, 1 Wash. Rep. 474. Et vide *Stewart v. Lee*, 3 Call's Rep. 421. *Bibb v. Cauthorne*, 1 Wash. Rep. 118. *Booe v. Tebbe et ux.* 1 Munf. Rep. 501. *Booker's exr. v. M'Roberts*, 1 Call's Rep. 243.

Debt may be brought on an instrument which does not of itself ascertain the sum due; but in that case, there must be in the instrument a reference to some other instrument, where the same is ascertained, to some known rule of computation, or to an assessment made to some known person. *Clark v. Campbell, Chipman's Rep.* 57.—AK. Ed.

Assessment of
damages un-
der Stat. 8 &
9 W. 3.

(1) Rolles v.
Rosewell,
5 T. Rep.
538. Hardy
v. Bern, *ibid.*
540. Ether-
sey v. Jack-
son, 8 T. Rep.
255.

(2) Toombs
v. Painter,
13 East, 1.

(3) Hodgkin-
son v. Marz-
den, M. S.
2 Campb. 121.
S. C.
Ante, 57.

deny any of the other matters stated in the declaration, must be specially pleaded; and therefore, in the case of a bail bond, to which this plea only is pleaded, the plaintiff has only to prove the execution of the bond, and need not prove the writ or assignment by the Sheriff. By the rules of the Common Law, the penalty of a bond, or other instrument, was in all cases considered as the debt, and therefore it was never necessary to give any evidence of the actual damage which the plaintiff had received; but the defendant, if aggrieved, was obliged to apply to a Court of Equity for relief. The Statute of 8 & 9 Will. 3, c. 11, has introduced a more equitable mode of proceeding in cases of bonds for performance of covenants; and, therefore, in these and all other actions for a penalty, it is now necessary for the plaintiff to suggest the breach complained of on the record, either by specially stating it in his declaration or replication; or where the declaration is general and judgment is given by default, or on demurrer, by suggestion subsequently entered on the roll; (1) and in the two former cases, if only one breach be alleged, it is sufficient to state it without saying, "according to the form of the Statute," (2) Upon the breach so assigned or suggested, the jury find the actual damage sustained by reason of the breach, as well as the nominal damages by reason of the detention of the debt. To enable them to do this, the plaintiff must be prepared with evidence to prove the extent of his injury, the same as if he had brought an action of *assumpsit* or covenant; and where the condition does not appear on the declaration, or in the pleadings, but is only suggested after judgment, he must also give some evidence of the bond to shew that the condition is as suggested; but it will be sufficient for this purpose if the plaintiff's attorney swears that the bond produced is the instrument delivered to him to bring the action, and that he knows of no other of the same date: without calling the subscribing witness. (3)

In actions founded on record, if the defendant deny the record, it must be by plea of *nul tiel record*, the mode of proof in which case has been before noticed. (b)

(b) Debt lies on a judgment, fairly obtained in another State; for such judgment is conclusive evidence of a debt. *Andrews v. Montgomery*, 19 Johns. Rep. 162. See vide ante, p. 67.

It seems, that the proper plea to an action of debt on a judgment of a Court of another State, is *nul tiel record. ibid.*

An action of debt may be brought on an unsatisfied judgment, obtained in the Courts of a sister State. *Sterne v. Spalding*, Kirb. Rep. 177.

Quere, Whether any action other than a *scire facias*, can be maintained upon a judgment in detinue. *Withers ex. v. Withers ex.* 6 Munf. Rep. 10.

The Statute of Limitations not having provided for the case of actions on specialties, cannot be pleaded in bar of any action founded on them; but if the obligee of a bond, or other creditor by specialty, lie by a long time without claiming his debt, payment will be presumed. This payment should be pleaded as having been made after the day, as well as at the day, for the proof of any interest being paid, or other act of the defendant, confirming the instrument, after the day of payment mentioned in the condition of a bond, would preclude the defendant from any such advantage on the plea of *solvit ad diem*, though ever so long a time had elapsed since such payment.⁽¹⁾ In cases where the presumption arises, instead of the defendant being called on to prove his affirmative allegation of payment, the onus will lie on the plaintiff to rebut the presumption. The nature of this presumption, and the kind of proof sufficient to repel it, has already been spoken of in its proper place.^(c)

Ch. IV. s. 1.
Plea of pay-
ment.

(1) *Moreland v. Bennet*, 1 Stra. 652.

Ante, 47.

In *Connecticut*, an action of *debt* will not lie on a judgment, (unless the plaintiff has no other mode of obtaining the fruit of his judgment) such an action being esteemed unnecessary and vexatious. *Welles v. Dexter*, 1 Root's Rep. 293.

Debt is not sustainable on the judgment of a Court possessing no jurisdiction. *Kibbe v. Kibbe*, *Kirb. Rep.* 119.

In an action of debt, on a judgment by foreign attachment, the declaration must allege that satisfaction of the former judgment could not be obtained. *Waldo v. Mumford*, *ibid.* 311.

Whether under the plea of *nil debet*, to an action of debt on a judgment, the defendant can give any special matter in evidence? *Meyer v. M'Lean*, 1 Johns. Rep. 309. Vide ante, p. 58, n. (c).

In an action of *scire facias*, founded on a judgment, under the plea of *payment*, *accord*, and *satisfaction*, cannot be given in evidence. *Kisham v. Nichols*, 1 Root's Rep. 75.

In a similar action, under the plea of *payment*, the defendant gave in evidence, that, when he executed the bond and warrant of attorney, on which the original judgment was obtained, the plaintiff promised to cancel it, on an event which had occurred since the judgment. *Hartzell v. Reiss*, 1 Minn. Rep. 326.—AM. ED.

(c) On a plea of payment to a bond, the Court will presume every thing paid, which, *ex equo et bono*, in equity, and good conscience, ought not be paid. *Hollingsworth v. Ogle et al.* 1 Dull. Rep. 257.

In *Pennsylvania*, where there is no Court of Chancery, under a plea of payment, in an action on a bond, and to prevent a failure of justice, *mistake*, or *want of consideration*, may be given in evidence. *Swift v. Hawkins et al.* 1 Dull. Rep. 17.

On a plea of payment to an action of debt on a bond, the defendant may give in evidence, that wheat was delivered to the plaintiff on account of the bond, at a certain price, and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence. *Buddicum v. Kirk*, 3 Cranch's Rep. 293.

On a plea of payment to a bond, evidence may be given, that the plaintiff was absent beyond seas, to extinguish interest. *M'Call v. Turner*, 1 Call's Rep. 133.

In an action of debt, brought on a bill of exchange, the defendant may give in evi-

SECTION II.

On simple Contracts.

Part II.
Nil debet.

(1) Warren
v. Corset,
2 Lord Raym.
589.

(2) Hardr.
332. Warner
v. Theobald,
Cowp. 589.

(3) Jones
v. Pope,
1 Saund. 39.
Bul. N. P.
170.

To actions of debt founded on the *simple contract* of the party, or where a specialty or record is not the gist of, but only inducement to the action ; (1) as in an action against a Sheriff for an escape ; or for rent on an indenture ; (2) or against an executor on a *devastavit* ; (3) and in like manner in cases founded on a duty raised by operation of law, the rules of pleading allow a much more general defence, namely, the general issue of *nil debet*, d) This, like the plea of *non assumpsit*, puts the whole of

denoe, under the plea of payment, a tender, to extinguish the interest. *Skipwith v. Morton*, 2 Do. 277.

In an action of debt, brought on a bond, a plea of conditions performed, is equivalent to a plea of payment. *Hammett v. Bullett*, 1 Call's Rep. 567.

Where two pleas of payment to a bond were joined, one, *before* the day, the other *at* the day, it was declared by the Court to be irregular, and one of them ordered to be stricken out. *Thayer v. Rogers*, 1 Johns. Cas. 152.

A tender of the principal and interest, due on a bond, is no bar to an action brought on a bond with a *penalty*. *Manny v. Harris*, 2 Johns. Rep. 24.

Bills of exchange, accepted in payment of a bond, will extinguish a demand on it so as to release the surety. *Watts v. Willing*, 2 Dall. Rep. 100. Vide ante, 409, n. (t.)

When a bond, from length of time, will be presumed paid. Vide ante, p. 51, n. (a)

And under the plea of payment with notice, *fraud*, either in the execution or consideration of a bond, may be given in evidence, and the plea of "*layman and unlettered*," &c. is not necessary. *Baring v. Shippen*, 2 Binn. Rep. 154.

On the issue of *non solvit*, to an action of debt, the practice is to enter the verdict for the sum found to be actually due, without any other determination of the issue. *Thompson v. Musser*, 1 Dall. Rep. 458.—AM. ED.

(d) An action of debt will lie where a sum of money is due by *express* agreement, either in writing or by parol, where the amount is *fixed*, and does not depend on future calculation. *Respublica v. Le Caze*, 2 Dall. Rep. 118.

In an action of debt, the declaration should state the demand with certainty. *Wilson v. Lenox et al.* 1 Cranch's Rep. 194.

In *Maryland*, an action of debt will not lie on a promissory note. *Linde v. Gardner*, 1 Cranch's Rep. 343.

In *Virginia*, an action of debt will not lie against the acceptor of a bill of exchange. *Smith v. Segar*, 1 H & Munf. Rep. 394.

Whether an action of debt will lie against executors on the simple contract of the testator? *Carson v. Hood's exrs.* 4 Dall. Rep. 108.

An action of debt will lie on an instrument in the form of a bond with a penalty

the case in issue, makes it incumbent on the plaintiff to prove every thing which he was obliged to state in his declaration, and enables the defendant, on his part, to prove any thing which shews the plaintiff has no demand on him. It has been held in some cases, (1) that a defendant may avail himself of the Statute of Limitations on this plea; but the modern practice has been to plead the Statute specially; and if the question were to arise, it would most probably be held that such plea was absolutely necessary to enable the defendant to avail himself of the Statute; the same reason applies to this case as to the case of *assumpsit*, namely, that notwithstanding the Statute, the debt still exists, for the remedy only is barred. (2) On such a plea, the replications and evidence would be the same as in the action of *assumpsit*. (c)

Ch. IV. s. 2.
On simple contracts.

(1) Lee v. Rogers, 1 Lev. 110.
Draper v. Glossop, 1 Ld. Raym. 153. Anon. 1 Salk. 278.

(2) Vide 1 Williams' Saunders, 283, n. (2.)
Quantock v. England, 5 Burr. 2628.

and a condition to be void on payment of a less sum, but *without a seal*. *Harwood et al. v. Crowell et al.* 2 Hayw. Rep. 396.

In an action of debt for rent, the defendant on the plea of *nil debet*, may give in evidence any special circumstances, shewing that the rent ought to be apportioned. *Newton v. Wilson*, 3 H. & Munf. Rep. 470.

It seems, that a *narr.* in debt, claiming no precise sum to be due and detained, would be bad. *U. States v. Colt*, 1 Peters' Rep. 154.—AM. ED.

(c) Vide ante, p. 420, n (b)

In *Connecticut*, where *bonds* are barred by seventeen years, an acknowledgment of the debt will not revive the action, and thereby save the bond out of the Statute. *Gustin v. Brattle*, Kirb. Rep. 299.

There is a species of action peculiar to that State, called an action of *book debt*, under the general issue of which, the Statute of Limitations may be given in evidence. *Miller v. Grosvenor*, 2 Root's Rep. 208.

In *New York*, under the issue of *seizin*, in an action of *dower*, the Statute of Limitations cannot be given in evidence, but must be pleaded. *Hitchcock et ux. v. Harrington*, 6 Johns. Rep. 290.

In the Supreme Court of the *United States*, it was in one case agitated, but not decided, whether the Statute of Limitations would be available to the defendant, in an action of debt under the plea of *nil debet*? *Lindo v. Gardner*, 1 Cranch's Rep. 343.

After a verdict for the plaintiff, in an action of debt under the plea of *nil debet*, it is no ground for arresting judgment, that the claim as shewn by the declaration, was barred by the Statute of Limitations; for it will be intended that if the Statute were given in evidence, the plaintiff rebutted it by some other evidence which avoided its operation. *Murdoch v. Herndon's exrs.* 4 H. & Munf. Rep. 200.

Under the plea of *nil debet*, to an action of debt brought on a *penal Statute*, the Act of Limitations may be given in evidence. *Watson v. Anderson*, *Hardin's Rep.* 458.

If the defendant's accounts are barred by the Statute of Limitations, they cannot be used as a set-off. *Gilchrist v. Williams*, 3 Marsh. Rep. 237.—AM. ED.

CHAP. V.

OF THE EVIDENCE IN ACTIONS ON STATUTES.

SECTION I.

On such as are called Penal.

Part II.
On penal
Statutes.

WHERE a certain sum of money, or so much as may be easily rendered certain by calculation, is given by way of penalty for any offence, either to the party injured, or to a common informer, the Statute creates a duty, the performance of which may be enforced by the action of *debt*.^(a) To this action the defendant may plead either *nil debet*,^(b) or *not guilty*, at his

(a) In many cases, although a Statute declares an act *void*, the Courts will construe it to mean, it is voidable. *Turrell v. Mooney*, 1 *Murphy's Rep.* 401.

In a penal Statute, or will never be construed *and*, so as to make it more penal. *The State v. Kearney*, 1 *Ruffin's Rep.* 53.

Penal Statutes must be construed strictly, according to the intention of the Legislature; and where not remedial, are not to be extended by equitable principles. *Melody v. Reab*, 4 *Mass. Rep.* 471.

A penal Statute which may be construed as authorising either a summary remedy, or an action in the ordinary course of proceeding, shall be taken to mean the latter. *Bennett v. Ward*, 3 *Caine's Rep.* 259.

Quere, How far the innocence of intention will excuse the infraction of a penal Statute, vide *Baker v. Richardson*, 1 *Cowen's Rep.* 77, n. a. *Anth. N. P. Rep.* 130, n. a.

When a penalty is given by Statute, and an action on the case is provided for its recovery, an action on the case for a *tort*, is intended, and not in *assumpsit*, for in such case no *assumpsit* is implied. *Peabody v. Hoyt*, 10 *Mass. Rep.* 36.—*AM. ED.*

(b) In an action of debt brought for a penalty, *nil debet* is the most proper plea. *Stilson v. Tobey*, 2 *Mass. Rep.* 521.

In an action of debt, brought to recover double the value of a specific article as a penalty, the plaintiff may recover a less sum than he demanded. *Perrin v. Sikes*, 1 *Day's Rep.* 19.

In an action of debt, *qui tam*, not guilty, is a good plea. *Burnham v. Webster*, 5 *Mass. Rep.* 266.

The defendant pleaded *nil debet*, and payment to an action of debt on a judgment in the Supreme Court of *Pennsylvania*; and it was held he was bound to produce and prove the record, or an exemplification thereof. *Rush v. Cobbett*, 2 *Johns. Cas.* 256.

Quere, Whether it be the general issue to an action of debt on a judgment, as to entitle the defendant to give special matter in evidence, pursuant to a notice for that purpose? *Meyer v. M'Lean*, 1 *Johns. Rep.* 509.

It is not a good plea to an action of debt on *retrognisance*, nor to an action founded on a record or *specialty*. *Bullis adm. v. Giddens et al.* 3 *Johns. Rep.* 64.

election ;(1) and on either plea it will be incumbent on the plaintiff to prove that the defendant has committed the acts imputed to him; to prove which, evidence must be adduced of the whole of the affirmative matter mentioned in the declaration. But when the declaration negatives any fact which the defendant alone can be prepared to prove, it seems to be incumbent on him to prove the affirmative: for instance, in an action on the game-laws, which prohibit all persons, unless possessed of certain qualifications, from killing game, it is agreed that proof of the defendant having killed game, or attempted to do so, by using a dog, a gun, or other engine for that purpose, will be sufficient on the part of the plaintiff, in an action; and the defendant must prove that he is within one of the exceptions which give the qualification. But on the question, whether it was not incumbent on the prosecutor to give general negative evidence on an information *before a magistrate*, the Court was, in one case,(2) equally divided; and even in *actions* where the negative matter is equally capable of proof by the plaintiff, as in an action for sporting without a certificate, it should seem that the plaintiff should be prepared with evidence to prove a search at the proper office nearest the defendant's residence, where, according to the provisions of the Act, such a certificate would be granted, and that no such certificate was entered there; for though the general rule is, that the affirmative only need be proved, yet we had very early occasion to observe that, where a man is charged with a transgression of the law, and it is in the power of the other party to prove the negative, the rule admits of an exception. I must, however, here observe, that in those actions for sporting without a certificate, which have fallen within my experience, no such evidence has been required.

The defendant may also avail himself on the general issue, of the suit not having been commenced in due time, which, by

Ch. V. s. 1.
On penal
Statutes.

(1) Vide *Cop-
pin qui tam v.
Carter*, 1 T.
R. p. 462.
Bull. N. P.
197.

(2) Vide *Rex
v. Stone*,
1 East, 639.

Ante, 8.

In debt, where a deed is inducement to, and in matter of fact the foundation of the action, *nil debet* may be pleaded. *Minton v. Woodworth et al* 11 Johns. Rep. 474.

It is a good plea in debt for an escape from the gaol liberties. *ibid.*

The plea of *nil debet* to an action on a judgment obtained in a sister State is bad, under the Constitution and Act of Congress of 1790. *Armstrong v. Carson's exrs.* 2 Dall. Rep. 302 Contra, *Wright v. Towers*, 1 Browne's Rep. App. i.

Wherever a Statute gives a right to recover damages reduced to a sum certain, pursuant to the provisions of such Statute, an action of debt lies, if no other specific remedy is provided. *Migelaw v. The Cambridge, &c. Turnpike*, 1 Mass. Rep. 202 *Jeffrey v. The Blue Hill Co.* 10 Do. 368.

Trespass is the proper form of action for recovering the treble damages given by the provincial Statute 1 Geo. 2, c. 4. for pulling down an uninhabited house. *Prescott v. Tufis et al.* 4 Mass. Rep. 146.—Am. Ed.

Part II.
On penal
Statutes.

- Statute 31 *Eliz. c. 5, s. 5*, is limited to two years, in cases where the forfeiture is given wholly to the King; and to one year, where given to the King and the informer jointly; in all cases where the Statute creating the offence has not fixed some other period of limitation. In cases, therefore, where it does not appear on the face of the record itself, that the suit was commenced within the limited time, the plaintiff should be prepared with the writ, which he may produce at any time during the trial, (1) to shew the exact day when the action was commenced. If the defendant were not served with the first writ, and an *alias* has issued, it must appear that the first writ was returned, even though the declaration were filed within a year after the issuing of the first; otherwise the second is no regular continuance of it; (2) but if the first writ appear to have been returned, and the return duly entered on record, continuances may be entered at any time afterwards. (3) Where only one writ has issued, and the declaration is filed within a year afterwards, it is not necessary to shew the writ returned, (4) or otherwise connect it with the declaration, even though the writ was not *qui tam*. (5)
- The evidence on the part of the defendant, when the general issue is pleaded, can be only such as tends to contradict that given on the part of the plaintiff, or to shew a reasonable excuse. In actions on the game laws, for instance, Courts will not try the right to a manor; and if the person who appointed the defendant his gamekeeper has only a colourable title, it will not be permitted to charge him in such action; (6) but if he has not any ground of claim, the mere circumstance of his appointing the defendant, will form no excuse; (7) and the plaintiff, in answer to a mere pretended title, may, on his part, prove the real title, and the commencement of the encroachment under which the defendant was appointed, for the purpose of shewing that it was wholly without colour or foundation. (8) As to the proof of qualification by estate, if the defendant prove himself to be in possession of land of the value of 100*l.* per annum, the presumption is, that he is entire owner, until the contrary be proved, by shewing that he only rents it, or that it is affected with incumbrances reducing its value below that sum. (9) A claim made by the defendant before commissioners of income, of an allowance by reason of charges affecting the land, is sufficient evidence of its not being of greater annual value than that stated by the defendant. (10) If the defendant admit his guilt, but mean to set up a former conviction, he must plead it specially; (11) and if the plaintiff reply *nul tiel record* to the plea of
- (1) *Maugham v. Tam. v. Walker, Peake's Cas.* 163.
- (2) *Harris v. Woolford*, 6 T. Rep. 617.
- (3) *Stanway v. Perry*, 2 Bos. & Pul. 158.
- (4) *Bates v. Jenkinson*, cited 6 T. Rep. 618.
- (5) *Parsons v. King*, 7 Term. Rep. 6.
- (6) *Hutchins v. Piper*, 4 Taunt. 585.
- (7) *Calcraft v. Gibbs*, 4 T. Rep. 681.
- (8) *S. C.* 5 T. Rep. 19.
- (9) *Hunt v. Andrews*, 3 B. & A. 341.
- (10) *Wetherall v. Hall, Cald.* 230.
- (11) *Rex v. Clarke*, 8 T. Rep. 320.
- (12) *Bredon v. Harman*, 2 Stra. 701.

conviction, it makes an issue in law, and the defendant must be prepared to prove it to the Court, as in other cases of record; but if *per fraudem* be replied, this will be tried by a jury, and the *onus* will lie on the plaintiff.(c)

Ch. V. s. 1.
On penal
Statutes.

(c) The record of a voluntary confession before a justice, and payment of the whole penalty, may be pleaded in bar to an action *qui tam*. *Hamilton v. Williams*, 1 Tyl. Rep. 15.—A. W. Ed.

SECTION II.

On remedial Statutes.

ACTIONS by the party grieved, on a Statute made for his protection, or the better enforcing his rights, are not considered in the light of penal actions, and are therefore much more favoured in a Court of Justice. They are not within the Stat. of *Eliz.* as to time.(1)

Sect. 2.
On remedial
Statutes.

(1) Vide
Carth. 282.
1 Show. 354.

The actions founded on Statutes of this description are very numerous. I shall, however, in this place, only notice those against a tenant who holds over after a notice to quit; and against a hundred for recompense to the party injured by a felony; as being the most usual. The action for subtraction of tithes will be more properly treated of in another chapter; and that against a Sheriff for selling without paying the landlord's rent, when we come to treat of actions against that officer.

1. The actions for additional rent, are given by the Statutes of 4 Geo. 2, c. 28, and 11 Geo. 2, c. 19. The former of these Statutes relates to notices given by *landlords*, the other to notices given by *tenants*. In the first case the Statute gives double the *yearly value* against the tenant who holds over; in the other, *double rent* only is recoverable. There are several other differences between the provisions of these two Acts of Parliament. The double of the *yearly value* given by the first can only be recovered by action; whereas the *double rent* given by the other may also be recovered by distress. The notice by the landlord must be in *writing*;(2) that by the tenant may be by *parol*;(3) In actions founded on the Statute 4 Geo. 2, where notice has been given by the landlord, the plaintiff must prove

Action by
landlord for
double rent.

(2) Wilkinson
v. Colley, 5
Bar. 2694.

(3) Timmons
v. Rowleson,
3 Bar. 1603.

Part II.
Action by
landlord for
double rent.

(1) Cutting
v. Derby,
2 Black. 1075.

(2) Cobb v.
Stokes, 8
East, 358.

(3) Ibid.

(4) Souleby
v. Neving,
9 East, 310.

(5) Wilkinson
v. Colley, 5
Burr. 2694.

(6) Goodtitle
dem. King v.
Woodward,
3 B. & A. 689.

(7) Cutting v.
Derby, 2 Black.
1075.

(8) Right
dem. Fisher
v. Cuthell,
5 East, 491.
Vide post.

(9) Wilkinson
v. Colley, ubi

that the defendant held under him, by shewing the taking, or payment of rent, having given him notice to produce his receipts; and to entitle himself to double the yearly value from the expiration of the term, he must prove that a notice signed by himself, or some other person duly authorised, was given to the defendant, previous to the expiration of the term, to quit at the end of it.(1) But if the tenant having continued to the end of the term, without any notice, afterwards hold over, the landlord may still, provided he has not done any act to acknowledge the continuation of the tenancy, give notice to the tenant to deliver up the possession, or pay double the yearly value,(2) in which case the tenant will be liable to double value from the time of the notice. By this Act, however, the landlord waves his right to any rent whatever during the time which the defendant has held over previous to the notice, for he cannot consider the defendant as a legal tenant during any part of the time after the end of the term, and a tortious holder afterwards.(3) The defendant being considered by this action as a tortious holder,(4) and not a tenant holding under an increased rent, it follows that no objection can be made to the action on an account of the plaintiff having recovered in an ejectment, on a demise laid previous to the time of the holding over. In the case of a tenancy from year to year, it must be proved that six months notice was given to quit at the end of the year. As to what persons shall be considered as authorised to give such notice, it has been held that a receiver, appointed by the Court of Chancery, may give the notice in his own name, and bring the action in the name of the person who has the legal estate;(5) and that if any common agent give the notice, his principal may confirm it by a subsequent recognition, though he had given no previous orders on the subject.(6) And tenant in common may alone give notice to quit *his moiety*, and maintain an action for double the yearly value *therof*;(7) but if there are several joint-tenants, all ought to join in giving the notice.(8) The plaintiff must then prove the yearly value of the premises, of which the rent actually reserved is in ordinary cases considered as the measure; and also the time during which the defendant held over after the day on which he ought to have quitted. He is not obliged to prove any other demand of possession previous to the bringing the action, besides the notice; nor need he prove that any person attended at the appointed time to receive the possession from the defendant.(9)

The action being founded on the wilful misconduct of the de-

feudant, cannot be maintained where he has held over under a fair claim of title, though such claim has been unsuccessful; and therefore where a tenant for life, with a power of leasing at the best rent, demised to a person already in possession, in consideration of a surrender of his lease, and the remainder-man afterwards disputed the validity of the lease on the ground of the best rent not being reserved, the jury finding that there was no fraud or collusion by the defendant, (1) the Court held he could not be charged with double the yearly value for the time during which he held over, while defending the ejectment which was brought to try the validity of the lease.

Ch. V. s. 2.
Action by
landlord for
double rent.

(1) Wright
v. Smith, 5
Esp. Cas. 203.

1. The first Statute which gave an action against a hundred, was that of *Winchester 2d. 13 Edw. I.*, commonly called the Statute of Hue and Cry. By this Statute a party robbed might, in case the hundred did not apprehend the felon within forty days, recover the amount of his loss from them. By Stat. 8, *Geo. 2. c. 16*, the time is extended to forty days after notice in the gazette, as thereby required; and it has been holden that where the declaration averred that the felon had not been yet taken, the apprehension of any one of the felons before the commencement of the action was a good defence. (2) Various provisions have been added from time to time by several later Statutes; and as the law now stands, the plaintiff, to sustain his action, must prove the following facts:

Action on the
Statute of
Hue and Cry.

(2) Baskerville v. Hund.
of Agbridge,
1 Sid. 11.

(3) Ashpole's
Case, 7 Co. 6.

1st. That he was robbed in the day-time; (3) that is, when there was day light enough to see a man's face. It is said in some of the cases, that the robbery must be in a highway; but this does not appear to be necessary, (4) so as it is in an open place, and not in a dwelling-house. (5) That the place where the robbery was committed is within the hundred sued; though a variance from the parish named in the declaration is not material. (6) It must also be proved, either that the robbery was on a working day; or that, if on *Sunday*, the plaintiff was going to church; for by the Statute 22 *Car. 2. c. 7*, a man travelling on a *Sunday* is taken out of the protection of the Act. (7)

(4) Cooper v.
Hundred of
Basingstoke,
2 Ld. Ray.
826.

(5) Sendil's
Case, 7 Co.
6, a.

(6) Shrewsbury v. Hund.
of Ashton,
2 Leon. 174.

(7) Tash-
maker v.
Hundred of
Edmonton,
1 Stra. 406.

2d. That the plaintiff, as soon after the robbery as he conveniently could, gave notice to some of the inhabitants of some town, village, or hamlet, near to the place where the robbery was committed. (8) It is not necessary that the notice should have been given to the inhabitants of the nearest village; (9) but it will be sufficient if it is given at the next village lying in the great road, though there is one nearer, lying out of it. Neither

(8) Required
by Stat. 27
Eliz. c. 13,
s. 11.

(9) Noy, 52.

Part. II. need the village at which the notice is given be in the same hundred or county,(1)
 Action on the Statute of Hue and Cry.

(1) *Tutter v. Inhabitants of Ducorum*, Cro. Car. 41. B. N. P. 184.

(2) Required by 8 G. 2, c. 16, s. 1.

(3) *Ball v. Handr d of Wymersley*, 2 Stra. 1170. Bul. N. P. 185, S. C.

Required by same Stat.

(4) *Whitworth v. Handr d of Grimshoe*, 2 Wils. 113.

3d. That, with as much convenient speed as might be after the robbery, he also gave notice of it to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithing-man of some town, parish, village, hamlet, or tithing, near unto the place wherein the robbery happened; or that he left notice in writing of the robbery at the house of such constable, &c. describing in such notice so given or left, as far as the nature and circumstances of the case would admit, the felon or felons, and the time and place of the robbery.(2) The plaintiff was robbed soon after six in the morning, about two miles and a half from *Northampton*, and the highwayman, to prevent his pursuit, cut his bridle and stirrups, threw them into a ditch, and turned his horse loose; the plaintiff recovered them, remounted his horse, and rode through a village without giving any notice to the inhabitants; but meeting three men on his return to *Northampton*, he informed them of the robbery, and arrived at *Northampton* at seven o'clock. He gave notice to an innkeeper there, and from thence went to a place three miles off, where the high constable resided, and between eight and nine gave notice to him. This was held to be good notice, for the high constable was the most proper person to apply to, and it was not required that he should go to the next constable.(3)

4th. The plaintiff must next prove, that, within twenty days next after the robbery, he caused a notice to be given in the *London Gazette*, describing, as far as the nature and circumstances of the case would admit, the felon or felons, and the time and place of the robbery, together with the goods and effects whereof he was robbed. To prove this, the gazette itself should be produced; and the notice should contain every material description of the robber. In one case, where the highwayman had red eye-brows, and that circumstance was omitted in the gazette, the omission of so distinguishing a mark was held to be fatal.(4) The notice must also contain a full and true description of the effects whereof the party was robbed, as far as they can possibly be ascertained; as if a man be robbed of bank-notes, of which he knows the dates and numbers, or could by inquiry or diligent search inform himself of those particulars, he ought to particularise them all; and in a case where a man being robbed of his watch, money, and several bank-notes, the numbers of some of which being known to him, and the others not, he neglected to give a further description of any than the

value, the Court of Common Pleas were equally divided on the question whether he could recover any part of his loss. **WILLES** Ch. V. s. 2. Action on the Statute of Ch. J. and **BURNEY J.** held he could not; but **ABNEY** and **BIRCH J.** were of opinion, that he was entitled to recover the value of those whereof he did not know the numbers and dates, and also his watch and money, which were sufficiently described. (1) **Chandler v. Hundred of Sunning, Barnes, 485. Bul. N. P. 186, S. C.**

5th. It is required by the Statute of *Eliz.* that the party robbed shall, within twenty days next before the commencement of the action, be examined upon oath before some justice of the peace of the county wherein the robbery was committed, inhabiting within the hundred where the robbery was committed, or near the same, whether he knows the robbers, or any of them; and if upon such examination it be confessed, that he knows the robbers, or any of them, that then he should enter into a bond by recognisance before the same justice, effectually to prosecute the robbers known. To prove this fact the plaintiff should produce the affidavit made before the justice; and it has been holden, that if the person who took it be proved to act as a justice, and it was delivered by his clerk to the person producing it, that is sufficient, without proving the justice's hand writing; (1) **Haller v. Hundred of Benhurst, Sir W. Jones, 239. Cro. Car. 211, S. C.** and if the person before whom it is sworn be a magistrate, it is sufficient, though he were out of the county at the time of administering the oath. (2) **Graham v. Hundred of B. acontree, B. N. P. 186.** (3) If no examination were taken in writing, the magistrate may be called as a witness, and depose to the substance of the usual affidavit; (4) and, as to the residence of the magistrate, **ABNEY J.** held, that where the affidavit was taken before one who lived twenty miles from the place where the robbery was committed, and many justices lived nearer, yet it was sufficient, as the act was only directory in this respect. (5) **Lake v. Hund. of Croydon, 1744. Bul. N. P. 186.** This oath must be taken by the person actually robbed, either master or servant; (6) **Green's Case, Cro. Eliz. 142.** and if two servants, or the servant and a stranger, to whom he delivered part of the money, are robbed at the same time, both should take the oath, in order to enable the master to maintain the action for the whole; for if only one be examined, the master can only recover so much as was taken from him; (7) **Ashcomb v. Hund. of Spelhome, 1 Show. 94. 241 Salk. 613, S. C.** but if the servant bring the action in his own name, on a robbery so committed on himself and another person, to whom he had delivered part of the money, it is sufficient for him alone to have made the affidavit, because the whole money is constructively in his possession; (8) **Ashcomb v. Hund. of Elthorn, S. C. Carth. 145.** and on the same principle, where master and servant are travelling together, and the master having delivered part of his money to the servant, they are both robbed, the master alone may make the affidavit. (9) **Jones v. Hund. of Bromley, and Birt. Hund. of Ossulston, cited Carth. 146 and 7.**

Part II.
Action on the
Statute of
Hue and Cry.

Required by
8 G. 2, c. 16.

Price v. Hun-
dred of
Chewton,
1 P. W. 437.

Ante, 221.

22 G. 2, c. 24.

Actions on
Riot Act..

(1) Reid v.
Clarke, 7
T. Rep. 496.
Burroughs
v. Wright,
1b. 614.

In order to make out the fact, that the oath was so taken within twenty days next before the commencement of the action, the original writ should also be produced.

Lastly, it must be proved, that before the commencement of the action, the plaintiff went before either the chief clerk or secondary; the filazer of the county wherein the robbery was committed; the clerk of the pleas of the Court wherein the action is commenced, or their respective deputies; or before the Sheriff of the county wherein the robbery was committed; and entered into a bond, to the high constable of the hundred, in the penal sum of 100*l.* with two sureties, approved of by those officers respectively, conditioned for payment of the costs, in case of his failure in the action. This bond must be produced, and one of the subscribing witnesses called to prove it. The Statute of 27 *Eliz.* having required that the action should be commenced within a year, the production of the writ is in some cases necessary to prove this fact also; and if the writ be tested within that time, that is sufficient, though it has not passed the great seal till afterwards.

As to the circumstances of the robbery, we have before had occasion to observe, that the plaintiff himself may, in some cases, be a witness; but by a late Act of Parliament, made in consequence of the suspicious circumstances attending the case of *Chandler v. The Hundred of Sunning*, before cited, it is enacted that no person shall recover more than the value of 200*l.* unless the person or persons robbed shall at the time of the robbery be together in company, and be in number two at the least, to attest the truth of the robbery.

The Riot Act (1 *Geo.* 1. st. 2, c. 5,) gives an action against any two inhabitants of the hundred to recover the value of certain buildings injured by rioters. Many cases had arisen on this Statute, which not only confined the operation of it within very narrow bounds, but also made the construction uncertain by reason of the degree of criminality in the rioters being a matter of consideration with the jury. Thus it was held, that unless the beginning to demolish or pulling down the house amounted to a felony in the rioters, the hundred was not liable; (1) and as that must depend on their intention, this was always a disputed question. To remedy these defects the Stat. 57 *Geo.* 3. c. 19, was passed, whereby it was enacted, (sec. 38th.) That "in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged or injured, or where any fixtures thereto attached,

or any furnitnre, goods or commodities whatsoever, which shall be therein, shall be destroyed, taken away or damaged, by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such riotous or tumultuous assembly, the inhabitants of the city or town in which such house, shop or building shall be situate, if such city or town be a county of itself, or is not within any hundred, or otherwise the inhabitants of the hundred in which such damage shall be done, shall be liable to yield full compensation in damages to the person or persons injured or damnified by such destruction, taking away or damage; and such damages may be demanded, sued for, and recovered, by the same means and under the same provisions as are provided in and by an Act passed in the first year of King *George the First*, intituled, 'An Act for preventing tumults and riotous assemblies, and for the speedy and effectually punishing the rioters,' with respect to persons injured and damnified by the demolishing or pulling down any dwelling-house, by persons unlawfully, riotously and tumultuously assembled:" so that now all kinds of buildings are within the protection of the law, and the sufferer is entitled to compensation whether the acts of the rioters amount to a felony or only a misdemeanor. The evidence of course will be merely the property of the plaintiff; the destruction of it by a riotous mob; and the means by which such destruction was effected. In regard to the extent of compensation, it is confined to the injury arising at the same time as the destruction of the building; and if while doing that, the rioters destroy goods and furniture in the house,(1) or damage the garden adjoining,(2) the hundred is liable to the extent of 699. such damage. By the Statute of *Geo. 1*, the hundred was not liable for the value of property stolen or taken away;(3) but this is also remedied by the express words of the other Act of Parliament. The Black Act (9 *Geo. 1*, c. 22,) gives a similar action for damage to the amount of 200*l*.* done by persons mali-

Ch. V. s. 2.
Action on the
Statute of
Hue and Cry.

(1) *Hyde v. Cogun*, Dougl.

(2) *Wilmot v. Horton*, Dougl. 701, n.

(3) *Beekwith v. Wood*, 1 B. & A. 487.

* In a case arising on this Statute, where a barn belonging to *A.* in the occupation of *B.* had been burnt, and corn belonging to *B.* therein also destroyed, Mr. B. THOMSON held that both landlord and tenant were entitled to recompense to the amount of 200*l*. each; and that an oath made by the servant of the tenant was sufficient for both. *Adderley v. Hundred of Offlow North, Stafford Spring Assizes 1802*. But in a case arising on the Statute 52 *G. 3*, c. 130, where an action was brought by several partners for an injury done to their buildings, and all the parties were present at the time, the Court of K. B. held, that all must join in the affidavit. *Nesham v. Armstrong*, 1 B. & A. 146. And in another case, arising on the Statute

Part. II. ciously killing or maiming cattle, cutting down trees, setting
Action on the fire to houses, &c. The 8 *Geo. 2*, c. 20, for the destruction of
Statute of Hue and Cry. turnpikes and works in navigable rivers; 10 *Geo. 2*, c. 32, for
hop-binds maliciously cut; and the Act 11 *Geo. 2*, c. 22, for
corn destroyed to prevent exportations: but as the evidence is
not very complex in any of these cases, it is unnecessary to say
more respecting them.

9 *Geo. 1*, it was holden that the affidavit must state, where the injury was done by
several, that the deponent does not know them, "or either of them." *Thurkel v.*
Hundred of Mulford, 3 *East*, 400.

CHAP. VI.

OF THE EVIDENCE IN ACTIONS UPON THE CASE.

Ch. VI.
General
observations.

UNDER this head might have been included the action of *assumpsit*; but having before had occasion to mention, at considerable length, the evidence required in that form of action, I shall confine the present chapter to those actions which are founded on *torts*; and which are generally understood to be intended, when an action is said to be *on the case*.(a)

Some of these are founded in *malice*, as actions for *slander* and *malicious prosecutions*; others in *negligence*, as where a man, having a right to use his own property, exercises his right so carelessly as to injure his neighbour; and a third class, on the direct invasion of incorporeal property.

In all these cases, the plaintiff is obliged to state the whole substance of his case in the declaration; and as he can only recover on the justice and conscience of it, whatever will in equity

(a) The owner of land, having for a valuable consideration, given license to another by parol, to build a bridge on his land, an action of trespass *de bonis asportatis* will lie against him for taking away the bridge, without the consent of him who erected it. *Ricker et al. v. Kelly et al.* 1 *Greenl. Rep.* 117.

But to support this action, the plaintiff must have the actual or constructive possession at the time. *Putnam v. Wyley*, 8 *Johns. Rep.* 337.

An action of trespass will not lie for a consequential injury, but it must be an action on the case. *Adams et al. v. Hemmenway*, 1 *Mass. Rep.* 145.

Trespass *vi et armis* lies where the act done is *in itself an immediate injury*; where the act is not *immediately* injurious, but only by *consequence and collaterally*, there trespass *vi et armis* will not lie, but an action on the case for the damages consequent on such act. *Taylor v. Rainbow*, 2 *H. & Munf. Rep.* 423. *Barnes v. Hurd*, 11 *Mass. Rep.* 57. *Cole v. Fisher*, *ibid.* 137. *Starr et al. v. Jackson*, *ibid.* 519.

An action *on the case* will lie in favour of one unlawfully deprived of a beneficial office, against the person who has deprived him of it. *Fulgham v. Lightfoot*, 1 *Call's Rep.* 255. *Gorden v. Butts*, *Penning. Rep.* 334.

Either trespass or case lies for seducing the plaintiff's daughter. *Parker v. Elliott*, 1 *Gibber's Rep.* 33.

When an action should be trespass, and when case, vide *Cotteral v. Cummins et al.* 6 *Serg. & R. Rep.* 343.

Trespass, and not case, lies against a plaintiff who serves an execution after it has expired. *Vail v. Lewis et al.* 4 *Johns. Rep.* 450.

A father may maintain an action on the *case*, for the seduction of his daughter. *Hornkath v. Barr*, 8 *Serg. & R. Rep.* 36. *Ream v. Rank*, 3 *Do.* 215.—AM. ED.

and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may be given in evidence by the defendant, on the *general issue*,⁽¹⁾ which is merely that he is *not guilty* of the premises wherewith he is charged. But in cases where the party justifies an act which is *prima facie* illegal, as the slander of another: or where an injury has in fact been committed, and there is no defence, but that of the remedy being barred by the Statute of Limitations; the defence must be specially pleaded.

On the plea of the *general issue*, the plaintiff must be prepared with evidence of all the facts stated in his declaration; and if the defendant plead the Statute of Limitations, the plaintiff must prove that the original cause of action accrued within the time of Limitation, for this action cannot be revived as in the case of *assumpsit* or debt, founded on an executed consideration.

SECTION I.

Actions founded in malice or fraud.

Sect. 1.
Slander.

IN *slander*, the plaintiff must prove all such material allegations, contained in his declaration, as are not implied by the words themselves.^(b) As where words spoken of a physician

What is Slander.

(b) The rule in slander seems to be, that where a charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an ignominious punishment, then the words are in themselves actionable. *Brooker v. Coffin*, 5 Johns. Rep. 188. *Shaffer v. Kintzer*, 1 Binn. Rep. 557. *M'Clurg v. Ross*, 5 Do. 218. *Andres et ux. v. Koppenheaver*, 3 Serg. & R. Rep. 255. *Elliot v. Alaberry*, 2 Bibb's Rep. 473.

The words, *she swore a false oath, and I can prove it*, are not actionable. *Packer v. Spangler et ux.* 2 Binn. Rep. 60.

To say of a man, that he was an *Unwed Irishman*, and got the money of the *United Irishmen* in his hands, and ran away with it, is not actionable, because it charges a breach of trust rather than a felony. *M'Clurg v. Ross*, 5 Binn. Rep. 218.

To say of another, *you got to bed with Sarah M.* is actionable. *Walton v. Singleton*, 7 Serg. & R. Rep. 449.

So, *he is such a whoring fellow, that it is with difficulty he can keep a girl about the house, being continually a riding them.* *ibid.*

So, *he* (the plaintiff meaning) *has committed fornication*, notwithstanding the *narr.* avers that the plaintiff was, at the time of uttering the words, a married man. *ibid.*

charge him with being a quack, and the plaintiff alleges that he had taken the degree of Doctor of Physic, it will be incumbent on him to give regular evidence of such degree. (1) But where

Ch. VI. s. 1.
Slander.

(1) *Morris v. Thornton*,
8 T. Rep. 303.

To say of a man, *he stole a dog*, is not actionable. *Findlay v. Bear*, 8 Do. 571.

The words *you have sworn to a lie*, are not in themselves actionable; but if averred to have been spoken of the plaintiff in a cause, and concerning the trial, and the evidence given by the plaintiff, the count will contain a sufficient cause of action. *Crookshank v. Gray*, 20 Johns. Rep. 344.

To charge one with *swindling*, is not actionable; for *swindler*, means no more than *cheat*, and to charge one with being a *cheat*, has always been holden not to be actionable. *Stevenson v. Hayden*, 2 Mass. Rep. 406.

To say of a drover, whose business is to purchase cattle, drive them to market, and sell them, that he is a bankrupt, is actionable without special damage being shown. *Lewis v. Hawley*, 2 Day's Rep. 495.

To say of the plaintiff, "*squire Oakley is a damned rogue*," is not actionable, the words not being said of him in his official capacity. *Oakley v. Farrington*, 1 Johns. Cas. 129.

Words spoken of a person in relation to his office of Sheriff, and amounting to a charge of malpractice, are actionable. *Dole v. Van Rensselaer*, *ibid.* 330. *Dodds v. Henry*, 9 Mass. Rep. 262.

To say, that the plaintiff is *forsworn*, is not actionable, *aliter*, that he is *perjured*. *Hopkins v. Beedle*, 1 Caines' Rep. 347.

So to say to the plaintiff "*he is perjured*," will be actionable. *Green v. Long*, 2 Caines' Rep. 91.

To say "*you swore to a lie for which you now stand indicted*," is actionable. *Polton v. Ward*, 3 Caines' Rep. 73.

To say of a candidate for an assembly, that "*he has been seen drunk and asleep in the assembly room, and is unfit to be a member*," is not actionable. *Gilbert v. Field*, *ibid.* 529.

To say to the plaintiff "*he has sworn falsely*," or "*he has taken a false oath against me in Squire Jamieson's Court*," or "*he has falsely and maliciously charged on me the crime of perjury*," will not be actionable. *Ward v. Clark*, 2 Johns. Rep. 10.

It is good after verdict. *Niven v. Munn*, 13 Johns. Rep. 48. Et vide *Chapman v. Smith*, 13 Do. 78.

The words, *you swore falsely at the trial*, are actionable in themselves, as necessarily importing a charge of perjury. *Fowle v. Robbins*, 12 Mass. Rep. 498.

Perjury may be assigned in an oath erroneously taken, especially while the proceedings remain unreversed. *Van Steenberg v. Kortz*, 10 Johns. Rep. 167.

To say "*she was hired to swear a child on me*," &c. is not actionable without special damage being laid; words to be actionable must subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment. *Brooker v. Coffin*, 5 Johns. Rep. 148.

Charging a single woman with *being with child with a bastard*, is actionable. *Smith v. Minor*, 1 Coxe's Rep. 16.

To say of a merchant "*you keep false books, and I can prove it*," is actionable. *Backus v. Richardson*, 5 Johns. Rep. 476.

To say to a witness, while he is giving his testimony in a cause in Court, to a point material to the issue, "*that is false*," (meaning what the witness said was false) is actionable; for when spoken maliciously, they are equivalent to a charge of perjury. *M. Claghry v. Wetmore*, 6 Johns. Rep. 82.

To say of the plaintiff, a merchant, "*he will be a bankrupt in six months*," is actionable. *Else v. Ferris*, 1 Anth. N. P. Cas. 14.

(1) Berryman
v. Wise,
4 T. Rep. 366.

(2) Smith v.
Taylor, 1
New Rep.
196.

the words spoken of an attorney,(1) or physician,(2) imply an admission by the defendant that the plaintiff was entitled to act in those characters, and charge him with negligence or misconduct in the practice of them, it is sufficient to give general evi-

So of a blacksmith. *Burtch v. Nickerson*, 17 Johns. Rep. 217.

Charging plaintiff with having kept a *badly house*, is actionable in itself, this being an indictable offence, involving moral turpitude. *Martin v. Stillwell*, 13 Johns. Rep. 275.

It is actionable to say of another, he made and published a libel. *Andres et al. v. Koppenhafer*, 3 Serg. & R. Rep. 255.

To say of a woman, *she took medicine to kill the bastard child she was like to have, and she did kill it*, &c. is actionable. *Widrig v. Oyer et ux.* 13 Johns. Rep. 124.

The words, *you are a vagrant*, are actionable. *Miles v. Oldfield*, 4 Yeates' Rep. 423.

Words which do not amount to a direct and positive charge of a crime, but which are spoken hypothetically *ex. gr. I will venture any thing he has stolen my book*, are actionable; for if they were not, it would be easy for the defamer, by cunningly adopting such form of expression, to ruin reputations with impunity. *Ney v. Otis*, 8 Mass. Rep. 122. Et vide *Sawyer v. Eifert*, 2 Nott & M' Cord's Rep. 511.

Words charging a married woman with adultery, are not actionable in themselves; but the plaintiff must allege and prove some special damage. *Buyt et ux. v. Gillespie*, 2 Johns. Rep. 115.

Contra in *Pennsylvania. Andres et ux. v. Koppenhafer*, 3 Serg. & R. Rep. 255.

To say of woman "*she is a common prostitute, and I will prove it*," is not actionable. *Brooker v. Caffey*, 5 Johns. Rep. 138.

So to call her a whore. *Frisbie v. Fowler et ux.* 2 Con. Rep. 707.

Sed vide *Wilson v. Lyles*, 2 Nott & M' Cord's Rep. 204. *Elliott v. Ailsbury*, 2 Bibb's Rep. 473.

An action of slander lies for charging the plaintiff with a crime committed in another State, although the plaintiff would not be amenable to justice in that State. *Van Ankin v. Westfall*, 14 Johns. Rep. 233.

An action of slander will lie upon charges made before a *Court Martial*, that are false and malicious, although on a matter altogether of military cognisance. *Miles v. Burnside et al.* 1 Nott & M' Cord's Rep. 426, n.

To call a clergyman "*a drunkard*," is actionable. *M' Millan v. Birch*, 1 Binn. Rep. 178. *S. P. Chaddock v. Briggs*, 13 Mass. Rep. 248.

To say of a man "*he has sworn false*," is not actionable, the *colloquium* being of an extra-judicial affidavit before a justice of the peace. *Shaffer v. Kintzer*, 1 Binn. Rep. 537. *Vaughan v. Havens*, 8 Johns. Rep. 84.

To say of the plaintiff "*she swore falsely and I can prove it*," is not actionable. *Packer v. Spangler*, 2 Binn. Rep. 60.

A declaration that the defendant, with an intention to injure the reputation of the plaintiff, as a merchant, falsely and maliciously spoke of him, "*Mr. Y. I must tell you you have received more tobacco than you have accounted for to the house*," (meaning the mercantile house of which the plaintiff and defendant were partners) without a *colloquium*, is good after verdict. *Hoyle v. Young*, 1 Wash. Rep. 188.

In *North Carolina* it has been ruled, to say to the plaintiff "*you swore false*," in two particulars in one oath in Court," is actionable. *Hamilton v. Dent*, 1 Hays. Rep. 116.

In *South Carolina*, to call a white man a *mulatto*, is actionable, without a special damage. *Eden v. Legare*, 1 Bay's Rep. 171. *King v. Wood et ux.* 1 Nott & M' Cord's Rep. 184.

dence of his having practised in the profession. In the last case, however, it should be observed,⁽¹⁾ that though the plaintiff had been called in as a physician to prescribe for a person on whom the defendant attended as apothecary, and the defendant, speaking of his prescription, said, "Dr. S——," the Judges of the Common Pleas were equally divided on the question, whether it was necessary for the plaintiff to give further evidence of his being a physician than his having practised as such; so that before such evidence is dispensed with, it ought clearly to appear that the defendant treated the plaintiff as a person qualified to act.

The plaintiff must next prove that the words laid in the declaration, or at least as to some of them,⁽²⁾ were spoken by the defendant; (c) for words spoken in the third person will not

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(1) Vide *Wogan v. Somerville*, 7 Taunt. 401; and Stat. 55 Geo. 3, c. 194, as to apothecaries.

(2) *Compagnon v. Martin*, 2 Black. 790.

To say of the plaintiff, that "he harboured the defendant's negro," is not actionable without proving a special damage. *Croskeys v. O'Driscoll*, 1 Bay's Rep. 481.

To call a man "a damned rogue," is not actionable. *Caldwell v. Abbey*, Hardin's Rep. 530.

Nor is it actionable to charge a man with "embezzling goods." *ibid.*

Words spoken by a party or his counsel, in the course of a trial are not actionable if they be pertinent to the issue. *Vigours v. Palmer*, 1 Browne's Rep. 40. *Swearingen v. Birch*, 4 Yeates' Rep. 322.

Where the defendant in a suit before a justice, turned to a witness who had just finished his testimony, and said to him *you have sworn a manifest lie*, it was held that the words were actionable. *Kean v. McLaughlin*, 2 Serg. & R. Rep. 469. Sed contra. *Badgley v. Hedges*, 1 Penning. Rep. 233.

So, if words actionable in themselves, be spoken by members of the same church, in the course of their religious discipline, and without malice, no action will lie, and of this the jury will decide. *Jarvis v. Hatheway*, 3 Johns. Rep. 180.

So for words spoken by the defendant, before a *Presbytery*, in the course of his defence against charges there brought against him by the plaintiff, no action will lie, if the defendant do not wander designedly from the point in question to utter them. *McMillan v. Birch*, 1 Binn. Rep. 178.

So charges contained in a petition to the council of appointment, for the removal of a public officer, although false, are not actionable, unless express malice be shewn. *Thorn v. Blanchard*, 5 Johns. Rep. 508.

After a verdict which ascertains words to have been spoken maliciously their meaning will be taken to be in their popular sense. *Beers v. Strong*, Kirb. Rep. 12.

The natural import of words will be the sense in which they will be construed, and the old rule is done away. *Rue v. Mitchell*, 2 Dall. Rep. 58.

Words will not be construed in *mitiori sensu*. *Walker v. Winn*, 3 Mass. Rep. 248. *Andres et ux. v. Koppenhafer*, 3 Serg. & R. Rep. 255. *Hoyle v. Young*, 1 Wash. Rep. 188. *Wilson v. Hogg*, 1 Nott & Mc Cord's Rep. 217. *Sawyer v. Eifer*, 2 Do. 511.

Where words, otherwise actionable, are explained at the time, by a reference to a known and particular transaction; they are to be construed accordingly; and being so explained, they were held not to be actionable. *Van Rensselaer v. Dole*, 1 Johns. Cas. 279.—Am. Ed.

(c) It is sufficient to prove the substance of the words laid in the narr. *Miller v. Miller*, 8 Johns. Rep. 58. *Kennedy v. Lowry*, 1 Binn. Rep. 393. *Hersh v. Ring-*

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v. Berry,
4 T. Rep. 217.(2) *Barnes*
v. *Holloway*,
1 T. Rep. 150.(3) *Rustell v.*
Macquister,
1 Campb. 49.
Lee v. Huson,
Peake's Cas.
166.
Soot v. Lord
Oxford and
Wife, cor.
Lawrence J.
Heref. Sum.
Ass. 1808.
See vide
Mead v. Dau-
bigny, *Park's*
Cas. 125, cont.

support a declaration for words spoken in the second ;(1)(d) nor words spoken by way of interrogation a charge of words spoken affirmatively.(2) But having proved the words laid in the declaration, he may also give in evidence other words not therein stated to shew the malignity of the defendant, although such other words are themselves sufficient to be the foundation of an action.(3)(e) Where special damage is the gist of the action, that

mult. 3 *Yeates' Rep.* 508. *Brown v. Lamberton*, 2 *Binn. Rep.* 34. *Borman v.*
Macquister, 3 *Do.* 515. *Ney v. Otis*, 3 *Mass. Rep.* 122.

After proving the words in the narr. the plaintiff may give in evidence other words not actionable to shew the malice. *Wallis v. Mease*, 3 *Binn. Rep.* 546.

So he may actionable words, spoken after the suit brought. *Wallis v. Mease*, 3 *Binn. Rep.* 546. *Shock v. McChesney*, 2 *Yeates' Rep.* 473. *Kean v. McLaughlin*, 3 *Serg. & R. Rep.* 469

That words were spoken in the heat of passion, is matter of mitigation merely. *Elce v. Ferris*, *Anth. N. P.* 23.—AM. ED.

(d) The rule in the text has been adopted by the following cases. *Miller v. Miller*, 3 *Johns. Rep.* 58. *Hoyle v. Young*, 1 *Wash. Rep.* 188. *McConnell v. McCoy*, 7 *Serg. & R. Rep.* 223. *Wolf v. Rodifer*, 1 *Har. & Johns. Rep.* 409.—AM. ED.

Evidence in Slander.

(e) From the reports of *Rustell v. Macquister*, and *Lee v. Huson*, (vide margin) it does not appear, whether the subsequent words on libels offered in evidence, had express reference to those which were the subject of the suit ; but in all the other cases they had.

In an action of slander the plaintiff may give in evidence his rank and condition in life to aggravate the damages, and the defendant may avail himself of such evidence when it will have a tendency to mitigate the damages. *Larned v. Buffington*, 3 *Mass. Rep.* 546.

So the defendant may give in evidence under the general issue, facts tending to mitigate the damages, which he could not do when he has pleaded the truth of the words in justification. *ibid.*

The plaintiff will not be permitted to prove that the defendant has spoken the like words as laid in the declaration since the commencement of the action. *Holmes v. Brown*, *Kirb. Rep.* 151.

In this action the plaintiff's general character may be inquired into where he has directly set up his character to be good, and will go to the point of damages. *Branson v. Lynde*, 1 *Root's Rep.* 354. *S. P. Seymour v. Merrill*, *ibid.* 459. *Vide Austin v. Hanchet*, 2 *Do.* 148.

So, in *North Carolina* the defendant may give in evidence in mitigation of damages, the plaintiff's general character. *Vick v. Whitfield*, 2 *Hayw. Rep.* 323. *Buford v. McLamy*, 1 *Nott & Mc Cord's Rep.* 268.

So in *Massachusetts*. *Wolcott v. Hall*, 6 *Mass. Rep.* 514.

But in *Vermont* the rule is otherwise. *Smith v. Shumway*, 2 *Tyl. Rep.* 74.

In an action of slander, evidence will not be received that there was such a report before the defendant spoke the words laid in the narr. *Lewis v. Niles*, 1 *Root's Rep.* 348.

But the defendant may be permitted to prove, in mitigation of damages, from whom she heard the story. *Leister v. Smith*, 3 *Root's Rep.* 24.

However, after a person has affirmed a scandal, his adding that a particular person told him so, will not be received in evidence. *Austin v. Hanches*, *ibid.* 148.

also must be proved, and must appear to have been the legal and natural consequence of the slander; for the wrongful act of a third person, as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted, will not support the action, though such dismissal was

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The defendant may give in evidence, in mitigation of damages, that he only repeated a current report, or that others had publicly declared the same thing. *Cook v. Barkley, Penning. Rep.* 169.

The defendant may prove, in mitigation of damages, that a person told him the words laid in the declaration. *Kennedy v. Gregory, 1 Binn. Rep.* 85. Vide *Schwartz v. Thomas, 2 Wash. Rep.* 215.

In slander, the plaintiff's general character is in issue. *Springstein v. Field, Anth. N. P.* 185, n. q.

But the defendant cannot give in evidence the general character of the plaintiff, as an insulting, provoking, and quarrelsome man; not that before the speaking of the slanderous words, the plaintiff was in the habit of villifying, insulting, and provoking defendant and his family. *M. Alexander v. Harris, 6 Munf. Rep.* 465.

Mitigation of damages.

Whether a person who repeats a slander, but who at the same time mentions the person from whom he received it, may plead that circumstance in justification, seems to depend on the intent, or *quo animo*, with which the words, with the name of the author, are repeated. *Dole v. Lyon, 10 Johns. Rep.* 447.

If the words are uttered generally, the defendant cannot justify by giving the name of the author, by his plea, or at the trial, it can then go only in mitigation of damages; but if at the time he repeated the words, he gave the name of the author, so that the party injured might have his action against him, this will be a justification. *Binns v. M. Cerkle, 2 Browne's Rep.* 79. Et vide *Hersh v. Ringwalt, 3 Yeates' Rep.* 508. *Kennedy v. Gregory, 1 Binn. Rep.* 85.

It seems, that the defendant, in mitigation of damages, may give evidence of circumstances which had induced a suspicion of guilt. *Williams et ux. v. Mayer et ux.* cited 1 *Binn. Rep.* 92, n.

But he cannot give in evidence that he has been in the habit of relating the circumstances in a manner different in some essential respects, from that charged in the narr. though he first has proved that such relation of the circumstances was true. *Wills v. Church, 5 Serg. & R. Rep.* 190.

A letter, stating that the writer had heard of a slanderous report, is good evidence to prove the circulation of the report, and may be read for that purpose; the hand writing of the person being proved; but it would be inadmissible to prove that the defendant propagated the report. *Schwartz v. Thomas, 2 Wash. Rep.* 215.

Quere, Whether in an action for words, proof of circumstances of suspicion, not amounting to full justification, be admissible by way of mitigation of damages, on the plea of not guilty. *Chatwood v. Mayo, 5 Munf. Rep.* 16.

On the plea of *not guilty*, they are not admissible. *M. Alexander v. Harris, 6 Munf. Rep.* 465.

Sed contra. *Buford v. M. Lumy, 1 Nott & M. Cord's Rep.* 268. *Bailey v. Hyde, 3 Con. Rep.* 463.

Where the words are in themselves actionable, and necessarily import a charge of some crime, there is no need of stating the manner or occasion of speaking them. *Fowle v. Robbins, 12 Mass. Rep.* 498.—Am. Ed.

If a *libel* be the injury complained of, the publication must be shewn, either by proof that the defendant wrote and published it; or that, being a bookseller, it was sold in his shop, by himself or his servant; (1) or, in case of a newspaper, that the paper was published to the world in the ordinary way, and that the defendant is the printer, editor, or proprietor of it; which may be shewn by evidence that he gave a bond to the stamp office for payment of the duties, and had occasionally applied there on the subject. (3)(h) And now by Stat. 38 Geo.

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(1) Rex v.
Almon, 5
Burr. 2686.

(2) Rex v.
Pearce,
Peake's
Cas. 75.

(3) Rex v.
Topham,
4 T. Rep. 126.

So in *Pennsylvania*, entire damages being assessed upon several counts in slander, one of which is bad, judgment will be reversed, and a *verdict de novo* awarded. *Shaffer v. Kintzer*, 1 Binn. Rep. 537.

But where a count contained words acknowledged to be actionable, coupled with others not actionable, but spoken at one time; the latter will be considered as merely in aggravation, and the jury having found entire damages will not vitiate their verdict. *Chipman v. Cook*, 2 Tyl. Rep. 456. *S. P. Bloom et ux. v. Bloom*, 3 Serg. & R. Rep. 391.

If the defendant attempt to justify a charge of felony, he must justify as to the specific charge laid, and cannot set up a charge of the same kind, but distinct as to the subject matter. *Andrews v. Funduxer*; 11 Johns. Rep. 38.

Where the words charged to have been spoken impute to the plaintiff the crime of perjury, without qualification, the defendant, to make out a justification, must prove that the plaintiff in giving his evidence, wilfully and corruptly swore false. *McKinly v. Rob*, 20 Johns. Rep. 351.

Slander of the husband, and slander of the wife, cannot be joined in the same action. *Ebersoll v. Krug et ux*, 3 Binn. Rep. 555.

A *narr.* laying that "there was a collusion between A. B. C. and D. to make E. swear a false oath," &c is not supported by proof of his having said "there was collusion between A. B. and C. to make E. swear a false oath." *Johnston v. Tait*, 6 Binn. Rep. 121.

Of the Pleadings.

(h) A *libel* is a malicious publication, whether true or false, expressed either in printing or writing, or by signs and pictures, and with intent to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, and ridicule. *Commonwealth v. Clap*, 4 Mass. Rep. 163.

No action can be maintained for a *libel* upon a petition for redress of grievances, whether the subject matter be true or false, merely on its being preferred to either branch of the General Assembly, or disclosed to any of its members. *Harvie v. Huntingdon*, 2 Tyl. Rep. 129.

Sending a sealed libellous letter to the plaintiff himself is not a ground for an action against the defendant. *Lyle v. Clasen*, 1 Cather' Rep. 581.

No action will lie without a publication, but an indictment may. *ibid.*

If separate suits are brought against each, the plaintiff can have but one satisfaction, but may elect *de melioribus damnis ibid.*

It seems, that where a person addresses a complaint to persons competent to redress the grievances complained of, no action will lie against him, as the suit of another who is named, whether his statement be true or false, or his motive innocent or malicious. *Thorn v. Blanchard*, 5 Johns. Rep. 508.

Though the words in such a case be false and actionable in themselves, yet

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1) *Vicars v. Hooocks, East, 1.*

2) *Guest v. Lloyd, Bul. F. P. 6.*

in fact induced by the slander. (1)(f) But a person shall publish a damage must be proved as laid where it is made and deli-
tain the action, yet the mere statement of the slander (sect. 2.) specifying the case of words actionable in themselves is not necessary for the plaintiff to prove that the slander was published in places of abode of all and damage. (2)(g).

(f) In actions of slander, where the proof of damage must be confined to the plaintiff cannot give evidence of damage. *Herrick v. Lapham, 10 J. Rep. 120. Thomas v. Rumsey, 6 Johns. Rep. 26.*

Whether being refused the law will take notice of the damage. —Am. Ed.

(g) In an action of slander in the narr. *ibid. 290.*

In the narr. ment

express malice; or that the petition was not presented merely to injure the plaintiff's character. If the slander is proved to be a joint act done by all persons, it is not necessary to prove malice. *Thomas v. Rumsey, 6 Johns. Rep. 26.* The contents of a libel cannot be admitted. *Aspinwall v. State, 10 Johns. Rep. 443.*

These facts being stated merely as inducement to the plaintiff or not, is a question of fact for the jury. *Herrick v. Lapham, 10 J. Rep. 120. Thomas v. Rumsey, 6 Johns. Rep. 26.* The plaintiff is not bound to prove the contents of a libel. *Aspinwall v. State, 10 Johns. Rep. 443.* The plaintiff is not bound to prove the contents of a libel. *Aspinwall v. State, 10 Johns. Rep. 443.*

Where an averment or colloquium introduces the subject of the pleadings, that is a proper subject of proof. *ibid.* The plaintiff is not bound to prove the contents of a libel. *Aspinwall v. State, 10 Johns. Rep. 443.* The plaintiff is not bound to prove the contents of a libel. *Aspinwall v. State, 10 Johns. Rep. 443.*

In an indictment for publishing an obscene book or print, it is sufficient to give a general description thereof, and to aver its evil tendency, without copying the book, or minutely describing the print. *Commonwealth v. Holmes, 17 Mass. Rep. 344.*

Where entire damages were given on the whole declaration, and one of the counts is defective, judgment will be arrested. *Cheatham v. Tillotson, ibid. 430.* In an action for a libel, the defendant may give in evidence, in mitigation of damages, a former publication by the plaintiff to which the libel was an answer, to explain the subject matter, occasion, and intent of the defendant's publication; but such prior publication, though a libel, will not be received under the plea of justification. *Hotchkiss v. Lothrop, 1 Johns. Rep. 225.*

Query, In an action for a libel, can the defendant give in evidence under the general issue, the general bad character of the plaintiff in mitigation of damages. *Hotchkiss v. Lothrop, 1 Johns. Rep. 225.* Et vide *Wolcott v. Hall, 6 Mass. Rep. 518.*

Under the plea of not guilty, the plaintiff cannot give in evidence subsequent publications by the defendant, to shew *quo animo* the defendant published the par-

every person and persons who are intended to be printer and printers, publisher and publishers thereof, if the number of proprietors, exclusive of the printer and publisher, shall not exceed two, and in case the same shall exceed that number, then of two such proprietors exclusive of such printer and publisher, and a true description of the house or building wherein any such paper is intended to be printed, and likewise the title of such paper. The Statute then (sect. 9,) proceeds to enact, that those affidavits, &c. or copies thereof, certified to be true copies as after-mentioned, that is (sect. 14,) under the hand or hands of one or

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graphs in question, where the intentions of the publication are not equivocal. *Stuart v. Lovell*, 2 Starkie's Rep. 93.

By a default, and interlocutory judgment, the fact of publication is admitted. *Tylkston v. Cheatham*, 3 Johns. Rep. 56.

As to evidence of publication, vide *Southwick v. Stevens*, 10 Johns. Rep. 443.

An unsuccessful attempt to justify the words or libel, is evidence of malice. *Jackson v. Stetson et ux.* 15 Mass. Rep. 48.

It is sufficient proof of the defendant being the printer of a newspaper in which a libel was published, for such paper to go to the jury, that the papers were deposited in a hole behind the door of a public library, and that the printer's common clerk received payment therefor. *Respublica v. Davis*, 3 Yeates' Rep. 128.

The defendant broke plaintiff's close, and posted on his door a wicked, malicious, and insulting handbill, and then setting out its tenor, and concluding to his damage, &c. is good. *Gibbons v. Ogden*, 2 South. Rep. 853.

The rule the greater the truth, the greater the libel, is not universally true. *Calhoun v. McMeans*, 1 Nott & McCard's Rep. 422.

In Massachusetts, the defendant cannot justify himself, when indicted for publishing a libel, merely by proving the truth of the publication. *Commonwealth v. Clap*, 4 Mass. Rep. 163.

Quere, in *New York*, vide *The People v. Crowell*, 3 Johns. Cas. 337. (Vide Act 5th April, 1805.)

It is not a justification of a libel, that the defendant signed the libellous paper, as chairman of a public meeting of citizens convened to nominate a candidate for a public office. *Lewis v. Faw*, 5 Johns. Rep. 1.

In an action for a libel, under the general issue, the defendant may give in evidence, in mitigation of damages, that he received it from another. *Morris v. Duane*, 1 Binn. Rep. 90. n.

In an action for a libel, the libellous matter set forth in the plaintiff's narr. the words "*U. States*," and in the paper produced it was written "*United States*," the variance was held to be immaterial, and the Court will examine the context to determine whether the variance be immaterial or not. *Lewis v. Faw*, 5 Johns. Rep. 1.

An action for a libel lies against the proprietor of a gazette, edited by another, though the publication was made without the knowledge of such proprietor. *Andrew v. Wells*, 7 Johns. Rep. 260.

The publisher of a libel is responsible to the party libelled, notwithstanding the libel is accompanied with the name of the author. *Dole v. Lyon*, 10 Johns. Rep. 447. *Runkle v. Meyer et al.* 3 Yeates' Rep. 518.

An action does not lie by an officer of a regiment of militia, for a publication reflecting upon the officers of the regiment generally, without averring a special damage. *Stimmer v. Buel*, 12 Johns. Rep. 475.—AM. Ed.

(1) *Vicars v. Wilcocks*, 3 East, 1.

(2) *Guest v. Lloyd*, Bul. N. P. 6.

in fact induced by the slander. (1)(f) But though the special damage must be proved as laid where it is necessary to maintain the action, yet the mere statement of special damages, in a case of words actionable in themselves, does not make it necessary for the plaintiff to prove that he has in fact sustained such damage. (2)(g).

(f) In actions of slander, where the words are not actionable in themselves, the proof of damage must be confined to the particular damage laid in the narr. The plaintiff cannot give evidence of the general loss of reputation by reason of the slander. *Herrick v. Lapham*, 10 Johns. Rep. 281.

Whether being refused admission into a Presbytery, is such special damage as the law will take notice of, *dubatur*. *McMillan v. Birch*, 1 Binn. Rep. 178.—AN. Ed.

Pleadings, &c. in Slander.

(g) In an action of slander, special damage cannot be proved without being alleged in the narr. *Bostwick v. Nickelson*, *Kirb. Rep.* 65. *S. P. Bostwick v. Hawley*, *ibid.* 290.

In *Massachusetts*, the same rule was recognised in an action for *false imprisonment*. *Rising v. Granger*, 1 *Muss. Rep.* 45.

A general allegation of damages will not be sufficient, but they must be so particularly set forth in the narr. as to ground a special inquiry. *Kirb. Rep.* 65.

The truth of the words cannot be given in evidence under the general issue, but must be pleaded in justification. *Barns v. Webb*, 1 *Tyl. Rep.* 17.

S. P. in *New York*. *Else v. Ferris*, 1 *Anth. N. P. Cas.* 14. *Shepard v. Merrill*, 13 *Johns. Rep.* 475.

If the narr. be insufficient, and it do not contain any introductory matter or *colloquium* by reference to which they can be rendered so, the inadequacy of it cannot be made good by a justification and confession of the words in bar. *Pelton v. Ward* 3 *Caines' Rep.* 73.

In an action for words spoken of an attorney, the narr. must allege a *colloquium* respecting his profession, or it will be fatal on a motion in arrest of judgment. *Gilbert v. Field*, *ibid.* 329.

The narr. in an action of slander will be good if it state the words spoken to be in substance, &c. *Kennedy v. Lowry*, 1 *Binn. Rep.* 393.

Sed vide in *New York*. *Ward v. Clark*, 2 *Johns. Rep.* 12.

So words spoken in the third person will support a narr. for words laid in the second person. *Tracey v. Harkins*, 1 *Binn. Rep.* 395, n. Sed contra. *McConnell v. McCoy*, 7 *Serg. & R. Rep.* 223.

In an action of slander, it is sufficient if it be substantially alleged that the words laid in the narr. were spoken of the plaintiff. *Brown v. Lamberton*, 2 *Binn. Rep.* 34.

Where the words imply malice, it need not be stated in the narr. *Hamilton v. Dent*, 1 *Huyw. Rep.* 116.

An *innuendo* stands in the place of *aforesaid*; and cannot properly be used to extend the meaning of words beyond their own import; nor to make that certain which was before uncertain. *Caldwell v. Abbey*, *Hardin's Rep.* 529. *McClurg v. Ross*, 5 *Binn. Rep.* 219.

If the words as laid in some of the counts in the narr. be actionable, and those laid in other of the counts be not actionable, and entire damages be given, judgment will be arrested. *Hopkins v. Beedle*, 1 *Caines' Rep.* 347.

It has been held, that a paper produced is not only evidence of the publication, by the defendant, but also evidence that it was published at the place described by the paper.⁽¹⁾ And, indeed, in the case of a newspaper, which from its very nature is intended for general circulation, proof of that paper being circulated in any county is proof of the publication of the libel there.⁽²⁾

In cases where the libel is in a foreign language, both the original and translation must be set out in the declaration,⁽³⁾ and in addition to the usual evidence of the libel, the translation must be proved to be correct.⁽⁴⁾

The defendant, on the *general issue*, may insist on the whole paper or writing, in which the libel is contained, being read, to explain the parts set out in the record;⁽⁵⁾ and may prove that he was an innocent publisher, as that he delivered the paper without knowing the contents;⁽⁶⁾ or that the publication is a true report of a trial at law;^{(7)*} or a copy of a report of the House of Commons;⁽⁸⁾ or the notification of the sentence of a court martial in the usual form; or the report made by him as president of a military Court of inquiry;^{(9)†} or that he was giving a character of a servant;⁽¹⁰⁾ or his opinion of the circumstances of a tradesman⁽¹¹⁾ to a person who inquired of him; or confidentially expressing his opinion of the conduct of the plaintiff in a particular business in which he and the person, to whom a letter charged as a libel was addressed, were jointly interested,⁽¹²⁾ or the like; for such facts shew that the communication was confidential, and that there was no malice in his mind.

* In the above case of *Curry v. Walter*, the Court entertained some doubt whether the defence set up should not have been pleaded specially; and no judgment having been given, that doubt must be considered as still remaining. The Chief Justice EYAR, at *N. P.* thought the general issue sufficient; and the principle upon which the Court decided that the action would not lie, and upon which the other cases above cited were determined, strongly supports his Lordship's opinion.

The evidence does not go merely to shew an excuse, but to prove that there was no malice in the mind of the defendant, and consequently, that the publication is not a libel; so it has been held, that fair and candid observations on public persons, (*Dibden v. Swan*, 1 *Esp.* 23.) are not to be considered as libellous: and that in an action for a libel, charging plaintiff, a bookseller, with publishing immoral books, the defendant might, under the general issue, produce such books to shew that his own publication was a fair stricture on those of the plaintiff. *Tubart v. Tipper*, 1 *Camp.* 350.

† Till the point shall be settled, however, it will always, in such cases, be advisable for the defendant to add a special plea to the general issue.

‡ This must be understood on the supposition of the plaintiff being able to give evidence of it; for the report itself could not be produced, nor any office copy of it. *Vide ante*, 124.

Ch. VI. s. 1.
Slander.

(1) *Rex v. Hart*, 10 *East*, 94.

(2) *Per Bailey J in Rex v. Sir F. Burdett*, *Hilary*, 2 *Geo.* 4.

(3) *Zenobio v. Axtel*, 6 *T. Rep.* 162.

(4) *Rex v. Peltier*, K. B. *Sittings after Hil* 1803.

(5) *Rex v. Lambart*, 2 *Campb.* 400.

(6) *Vide Rex v. Almon*, *supra*.

(7) *Curry v. Walter*, 1 *Boa & Pul.* 323.

(8) *Rex v. Wright*, 2 *T. Rep.* 293.

(9) *J. K. v. Sir J. Moore*, 2 *N. R.* 341.

(10) *Edmondson v. Stephenson*, The Chief Justice *Bul. N. P.* 8. *Weatherston v. Hawkins*, 1 *T. Rep.* 110.

(11) *Herver v. Dowson*, *B. N. P.* 8.

(12) *McDonough v. Chalmers*, 1 *Campb.* 267.

Part II.
Slander.(1) *Vicars v. Wilcocks*, 8 East, 1.(2) *Guest v. Lloyd*, Bul. N. P. 6.

in fact induced by the slander.(1)(f) But though the special damage must be proved as laid where it is necessary to maintain the action, yet the mere statement of special damages, in a case of words actionable in themselves, does not make it necessary for the plaintiff to prove that he has in fact sustained such damage.(2)(g).

(f) In actions of slander, where the words are not actionable in themselves, the proof of damage must be confined to the particular damage laid in the *narr.* The plaintiff cannot give evidence of the general loss of reputation by reason of the slander. *Herrick v. Lapham*, 10 Johns. Rep. 331.

Whether being refused admission into a Presbytery, is such special damage as the law will take notice of, *dubatur.* *McMillan v. Birch*, 1 Binn. Rep. 173.—AN. ED.

Pleadings, &c. in Slander.

(g) In an action of slander, special damage cannot be proved without being alleged in the *narr.* *Bostwick v. Nickelson*, Kirb. Rep. 65. *S. P. Bostwick v. Hawley*, *ibid.* 290.

In *Massachusetts*, the same rule was recognised in an action for *false imprisonment.* *Rising v. Granger*, 1 Mass. Rep. 45.

A general allegation of damages will not be sufficient, but they must be so particularly set forth in the *narr.* as to ground a special inquiry. *Kirb. Rep.* 65.

The truth of the words cannot be given in evidence under the general issue, but must be pleaded in justification. *Barns v. Webb*, 1 Tyl. Rep. 17.

S. P. in *New York.* *Else v. Ferris*, 1 Anth. N. P. Cas. 14. *Shepard v. Merrill*, 13 Johns. Rep. 475.

If the *narr.* be insufficient, and it do not contain any introductory matter or *colloquium* by reference to which they can be rendered so, the inadequacy of it cannot be made good by a justification and confession of the words in bar. *Pelton v. Ward* 3 Caines' Rep. 73.

In an action for words spoken of an attorney, the *narr.* must allege a *colloquium* respecting his profession, or it will be fatal on a motion in arrest of judgment. *Gilbert v. Field*, *ibid.* 329.

The *narr.* in an action of slander will be good if it state the words spoken to be in substance, &c. *Kennedy v. Lowry*, 1 Binn. Rep. 393.

Sed vide in *New York.* *Ward v. Clark*, 2 Johns. Rep. 12.

So words spoken in the third person will support a *narr.* for words laid in the second person. *Tracey v. Harkins*, 1 Binn. Rep. 395, n. *Sed contr.* *McConnell v. McCoy*, 7 Serg. & R. Rep. 323.

In an action of slander, it is sufficient if it be substantially alleged that the words laid in the *narr.* were spoken of the plaintiff. *Brown v. Lamberton*, 2 Binn. Rep. 34.

Where the words imply malice, it need not be stated in the *narr.* *Hamilton v. Dent*, 1 Hugw. Rep. 116.

An *inuenso* stands in the place of *aforsaid*; and cannot properly be used to extend the meaning of words beyond their own import; nor to make that certain which was before uncertain. *Caldwell v. Abbey*, *Hardin's Rep.* 529. *McChung v. Ross*, 5 Binn. Rep. 219.

If the words as laid in some of the counts in the *narr.* be actionable, and those laid in other of the counts be not actionable, and entire damages be given, judgment will be arrested. *Hopkins v. Beedle*, 1 Caines' Rep. 347.

by indictment at the sessions for a misdemeanor, the clerk of the peace may attend with the original record; (1)(2) and though in cases of felony, the officer having the custody of records

Ch. VI. s. 2.
Malicious
prosecutions.

(1) *Morrison v. Kelly*, 1 Blac. 385.

Action for malicious prosecution.

(2) If a man falsely and maliciously, and without probable cause, sue out a civil process against another, although in regular and legal form, and cause him to be arrested and imprisoned, the former is answerable in damages for the tort, in an action for a false and malicious prosecution. *Watkins v. Baird*, 6 Mass. Rep. 506. *Headen v. Shed*, 11 Do. 500. *Vanduxon v. Linderman*, 10 Johns. Rep. 106.

Demanding excessive bail, although plaintiff has a well founded cause of action, or holding to bail when he has none, if done for the purpose of vexation, entitles the party aggrieved to an action for a malicious prosecution. *Ray v. Law*, 1 Peters' Rep. 210.

But if bail be not demanded, no action lies, however unfounded or futile the suit may be. *ibid.*

It lies for maliciously, and with a determination to harass, vex, impoverish, and distress the plaintiff, by directing the Sheriff to levy nearly double the sum due on a judgment obtained against plaintiff, and causing the Sheriff to levy on and sell the goods of the plaintiff to an amount exceeding the sum due. *Semmer v. Will*, 4 Serg. & R. Rep. 19.

But it cannot be maintained, for the ordinary costs and expenses of a defence, without an arrest or special grievance. *Potts v. Imlay*, 1 South. Rep. 330.

It lies for maliciously executing process in an oppressive manner. *Rogers v. Brewster*, 5 Johns. Rep. 125. *Purrrington v. Loring*, 7 Mass. Rep. 388.

It lies for issuing process without any cause of action. *Stoddard v. Bird*, Kirk. Rep. 65.

So, for seizing and detaining plaintiff's goods and chattels. *Young v. Gregory*, 3 Call's Rep. 446.

It will not lie for bringing a civil suit, unless such suit were malicious and without probable cause. *White v. Dingley*, 4 Mass. Rep. 433.

Two or more cannot join, because the action is personal. *Ainsworth et al. v. Allen*, Kirk. Rep. 145.

Vide on this subject, *Leaves v. Sherman*, 1 Root's Rep. 159.

It will not lie for one while attending as a witness, under the protection of a subpoena, though the debt, for which the execution had issued, had been previously paid. *Moore v. Chapman*, 3 H. & Munf. Rep. 260.

This action will lie against one who charged the plaintiff with a felony, even though the plaintiff were discharged by the justice. *Sacor v. Babcock*, 2 Johns. Rep. 203.

In this action, it is not sufficient to allege that the defendant did it without any just cause, but it must state that it was done without any probable cause. *Ellis v. Thilman*, 3 Call's Rep. 3.

Any prosecution, carried on knowingly, wilfully, wantonly, or obstinately, for no purpose or end of justice, but merely for the vexation of the person prosecuted, is malicious. *Kerr v. Workman*, Adl's. Rep. 270.

To support this action, the indictment must have been prosecuted without probable cause, maliciously, and the plaintiff must have been acquitted. *Moody v. Pender*, 2 Bayw. Rep. 29.

Where on the trial of the original prosecution, the defendant in the civil action was the only witness, what he then swore will be, *ex necessitate*, admitted to be proven for him in the civil action. *ibid.*

Part II.
Slander.

(1) *Vicars v. Wilcocks*, 3 East, 1.

(2) *Guest v. Lloyd*, Bul. N. P. 6.

in fact induced by the slander.(1)(f) But though the special damage must be proved as laid where it is necessary to maintain the action, yet the mere statement of special damages, in a case of words actionable in themselves, does not make it necessary for the plaintiff to prove that he has in fact sustained such damage.(2)(g).

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Pleadings, &c. in Slander.

(g) In an action of slander, special damage cannot be proved without being alleged in the narr. *Bostwick v. Nickelson*, Kirb. Rep. 65. *S. P. Bostwick v. Hawley*, *ibid.* 290.

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In an action of slander, it is sufficient if it be substantially alleged that the words laid in the narr. were spoken of the plaintiff. *Brown v. Lamberton*, 2 Binn. Rep. 34.

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If the words as laid in some of the counts in the narr. be actionable, and those laid in other of the counts be not actionable, and entire damages be given, judgment will be arrested. *Hopkins v. Beedle*, 1 Caines' Rep. 347.

purpose one of the grand jury may be called. (1)(m) A person who acted merely as a justice of peace, though his name be on the back of the indictment as prosecutor, is not liable to an action. (2) The plaintiff should also be prepared to prove the falsehood of the charge; and if the bill were found by the grand jury, he must prove that there was not the least cause for the prosecution. (3)(n) This fact of the want of probable cause cannot be inferred from the mere proof of the defendant not having appeared when the indictment was called on, or of his having, after commencing the prosecution, declined to prefer an indictment, (4) but some further evidence must be given by the plaintiff before the defendant is called on for his defence; (5) for it must be recollected that the prosecution being founded on the oath of the party, such oath must be taken to be true until the contrary is proved. (6) Where such oath has not obtained credit, as in cases where the bill was thrown out, it seems formerly to have been considered that the *onus* of proving a probable cause would lie on the defendant; (7) but in the later decisions it has been held, that in this case also the plaintiff must give some evidence of the want of probable cause. (8) Malice is necessary to support the action, but that will be implied from the want of probable cause; whereas the most express malice will not preclude the necessity of proving the want of probable cause where a bill has been found. (o) If it appear from the evidence offered

Ch. VI. s. 1.
Malicious
prosecutions.

(1) Sykes v. Dunbar, Selw. N. P. 1001.

(2) Girtlington v. Pitfield, 1 Vent. 47.

(3) Vide Saville v. Roberts, 1 Salk. 14. 1 Lord Ray. 374.

(4) Wallis v. Alpine, 1 Camp. 304.

(5) Purcell v. Monaghan, 9 East, 361. 1 Camp. 199. and cases there cited.

(6) Vide ante, 322, note.

(7) Inledon v. Berry, 1 Camp. 303.

(m) This action will lie where a criminal prosecution was commenced, although no indictment was preferred to the grand jury. *Shock v. M' Chesney*, 4 Yeates' 5 Taunt. 187. *Rep.* 507, overruling the same case at *Nisi Prius*, 2 Do. 473.

Sed vide contra. *O'Driscoll v. M' Burney*, 2 Nott & M' Cord's Rep. 54.—AM. EN.

(n) Where a *nolle prosequi* is entered on the warrant by the solicitor, but no order of discharge is obtained from the Court, this is not such a termination of the prosecution as will enable the party to maintain an action for a malicious prosecution. *Smith v. Shackelford*, 1 Nott & M' Cord's Rep. 36. Et vide *Thomas v. De Graffenreid*, 2 Do. 143.

A *nol. pros.* entered on an indictment, is no bar to another indictment for the same offence. *Commonwealth v. Wheeler et al.* 2 Mass. Rep. 172.—AM. EN.

(o) In *Connecticut*, in an action for a vexatious suit, brought on a Statute of that State, as grounds of special damage, the plaintiff may also shew his peculiar situation and circumstances, at the time such suit was brought. *Nichols v. Brunsen*, 2 Day's Rep. 211.

In an action brought for a malicious and groundless action, the special circumstances of malice, oppression and injury, must be set out in the *narr.* *Elkinton v. Deacon*, Penning. Rep. 160. *Parker's adms. v. Frambes*, *ibid.* 156.

In an action for *false imprisonment*, the defendant justified, under the authority of an inferior Court, a replication that such Court had no jurisdiction, would be insufficient, because it does not appear on the face of the process, and it would be too late to shew it by any evidence *dehors* the record. *Weester v. Parsons*, *Kirb. Rep.* 110.

Part II.
Malicious
prosecutions.

Malicious
arrest.

(1) *Croke v. Dowling*,
Bul. N. P. 14.
See also
Webb v. Herne, 1 Bos.
& Pul. 92.

(2) *Lloyd v. Harris*, Peck
Cas. 174.

(3) *Bristow v. Hayward*,
4 Camp. 214.

(4) *Kirk v. French*,
1 Esp. Cas. 80.

(5) *Poynton v. Forster*,
3 Camp. 60.

(6) *Habersham v. Trosby*,
3 Esp. 38.

by the plaintiff, or from that produced by the defendant, that there was but a *probable cause* for the prosecution, that is a sufficient defence to the action. To increase the damages, the length of imprisonment, the expenses of the plaintiff, and the circumstances of the defendant, are also proper subjects of proof.

To support the action for a *malicious arrest*, the plaintiff should prove the affidavit of the defendant, either by production of the original, or proof of an office copy. The former seems to be the best and safest evidence. (1) He must also prove an examined copy of the writ and return; and was required by Lord KENYON, in one case, to produce and prove the Sheriff's warrant under which the arrest was made. (2) though when the defendant is connected with the writ by the affidavit of debt, this seems hardly necessary. Having then proved the arrest, the plaintiff must next prove that the cause is ended, either by an entry on the record, or at least by a rule of Court for discontinuance of the action, and payment of costs under it. (3) An order of a Judge for that purpose does not appear to be sufficient. (4) And in like manner, where a commission of bankruptcy was ordered by the Chancellor to be superseded, but no writ of *supersedeas* had issued, Lord ELLENBOROUGH held the order not sufficient proof. (5) In this case also he must prove that the arrest was without reasonable or probable cause; for the mere circumstances of it ultimately appearing that nothing was due on a disputed account is not sufficient; and where the original cause was referred to arbitration, and the arbitrator determined on the examination of the parties, and inspection of their books, Lord KENYON held that the action was not maintainable. (6)

As malice, either express or implied, is necessary to support

If an action for *false imprisonment* be brought, for taking the plaintiff in execution on a case in which the costs are by mistake larger than those actually awarded, the Court will give leave to amend the execution. *Holmes v. Williams*, 3 *Cuinoes' Rep.* 98.

The essential foundation for this action is, that the defendant was prosecuted without probable cause. *Ulmer v. Leland*, 1 *Greenl. Rep.* 135.

To support this action, both *malice* and the want of *probable cause* must be established against the defendant. *Munns v. Dupont et al.* C. C. April, 1811, *M. S. Rep. S. C.* 2 *Browne's Rep. App.* 42 *Lyon v. Fox*, *N. Prius*, 2 *Browne's App.* 67. *Bell v. Graham*, 1 *Nott & M'Cord's Rep.* 278.

The question of *malice* is for the jury; *probable cause*, is a mixed question of law and fact, and what circumstances are sufficient to prove probable cause, are to be judged by the Court. Whether the circumstances which amount to probable cause are proved, is for the jury. *Lyon v. Fox*, 2 *Browne's Rep. App.* 69. Vide *Crabtree v. Horton*, 4 *Munf. Rep.* 59. *Leggett v. Blount*, 1 *Tayl. Term Rep.* 123.—AN. ES.

an action for slander, or an unfounded prosecution, so a *fraudulent* intention must be proved to support an action for a *deceit* properly so called. Those actions which are founded on a false representation or concealment of the defects of any commodity, sold by the defendant to the plaintiff, have been before spoken of. (1)(p) They are generally considered as breaches of con-

Ch. VI. s. 1.
Deceit.

(1) Ante, 319.

Action of deceit.

(p) When a person has accepted articles manufactured for him, he may maintain an action against the manufacturer for any deceit and fraud in the workmanship. *Everett v. Gray et al.* 1 Mass. Rep. 101.

This action can be maintained whether for the sale of provisions or other articles, in those cases only, where an affirmation or representation wilfully false has been made; or where some artifice has been practised; and it must appear that the party purchasing had been actually deceived, and had sustained a loss or damage. *Emerson et al. v. Brigham et al.* 10 Mass. Rep. 197.

An action will lie for the advancing money to a bankrupt, with intent to enable him to obtain on a credit, goods which go into the possession of the lender, though the plaintiff never had any view or even knowledge of the defendant. *Windover et al. v. Robbins*, 2 Tyt. Rep. 1.

It will lie for falsely and deceitfully affirming another to be a man of property, by which the plaintiff was induced to trust him. *Wise v. Wilcox*, 1 Day's Rep. 22.

An action on the case, in the nature of deceit, will lie for false representations by words and actions, made by the defendant with intent to deceive, whereby the plaintiff sustained damage, though the defendant had no interest in making such representations. *Hart v. Tallmadge*, 2 Day's Rep. 381.

A. applied to the plaintiff to buy goods on a credit, who asked the defendant as to the solvency of A. the defendant answered, *A was good, and as good as any man in the county for that sum*; though he had at that time a judgment against, and knew A. to be insolvent; the plaintiff having lost his debt, brought an action against the defendant for *falsely and deceitfully* recommending A.; and it was held that fraud or deceit with damage, furnishes a good cause of action. *Upton v. Vail*, 6 Johns. Rep. 181.

Although the affirmation was merely verbal, without any note or memorandum in writing between the parties. *ibid.*

Sed quere, Whether such an action will lie. *Ward v. Center*, 3 Do. 269.

The deceit is the gist of the action, and the plaintiff must prove actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. *Young et al. v. Covell*, 8 Do. 19. Et vide *Barney v. Dewey*, 13 Do. 224.

In the sale of provisions for domestic use, the vendor is bound to know that they are wholesome and sound, at his peril; and if they are not, case lies to recover damages for the deceit. *Van Bracklin v. Fondu*, 12 Johns. Rep. 468.

Where a contract of sale is reduced to writing, you cannot maintain an action on an implied warranty, but must resort to an action of deceit. *Wilson v. Marsh*, 1 Johns. Rep. 502.

A special action on the case in the nature of deceit, will lie for representing the credit and character of a merchant to be what the defendant knew was false, or for fraudulently concealing what he ought to have revealed. *Rumsey v. Lovell*, 1 Anth. N. P. Cas. 11.

An action of deceit will lie for deceitfully asserting an unsound mare to be sound, and fraudulently encouraging the plaintiff to buy her. *Irwin v. Sherrill*, Tayl. Rep. 1.

tract, and where the assertion is unqualified, the action is maintainable, though the defendant himself were mistaken. But where a man, on being applied to for information as to the cir-

Whether an action on the case for a deceit, be maintainable on a parol false affirmation or representation, as to the credit and responsibility of a third person, whereby the plaintiff was induced to trust him, in consequence of which he suffered a loss; and whether fraud or an intention to deceive the plaintiff, on the part of the defendant, or collusion between the defendant and such third person must be proved? *Ward v. Center*, 3 Johns. Rep. 269.

Whether there be fraud or not, is a matter of fact, and the jury will decide. *ibid.* An action of deceit will not lie against the plaintiff for affirming himself to be a man of property, when he really was insolvent. *Fisher v. Brown*, 1 Tyl. Rep. 387.

No action will lie against the vendor of real estate, for false and fraudulent representations as to the quality and situation of land, both of which are open to view, and might be seen. *Sherwood v. Salmon*, 2 Day's Rep. 128.

In an action on the case in the nature of deceit, an express allegation that the plaintiff made the affirmation *falsely*, *fraudulently*, or *knowingly* is not necessary; it is sufficient, especially after verdict, if the declaration in its concluding part say, "and so by reason of the said affirmation, the plaintiff was *falsely* and *fraudulently* deceived." *Bayard v. Malcolm et al.* 2 Johns. Rep. 550. S. C. 1 Johns. Rep. 453. See *vide* *Bacon v. Brown*, 3 Bibb's Rep. 35. *Smith v. Miller*, 2 Do. 618.

In an action for a deceit in selling to the plaintiff, for a valuable consideration, land which had no existence, it is immaterial whether any and what covenants are mentioned in the deed. The purchaser defrauded has a right to treat the deed as a nullity, and may maintain an action on the case for the deceit. *Wardell v. Fuddick et al.* 13 Johns. Rep. 325.

For a fraudulent representation of a privilege annexed to land, *vide* *Morrell et al. v. Colden*, 13 Do. 395.

In an action on a deceit for an exchange of horses, the plaintiff alleging a warranty of soundness on the part of the defendant, the defendant may shew by evidence that the horse received by him was also unsound. *McLene v. Fullerton*, 4 Yeates' Rep. 522.

Passing a note to A. who cannot read, and assuring him that B. is security upon it, when he is not so, will sustain an action. *Decker v. Hardin*, 2 South. Rep. 579. *Meeker v. Potter*, *ibid.* 586.

An action of deceit will lie against an infant on a warranty for the sale of a horse; and even where the form of action is *ex contractu*, and the substance *ex delicto*, the defense of infancy will not avail. *Word v. Vance*, 1 Nott & M'Cord's Rep. 197.

Whenever in an intercourse between two persons relative to property, one conceals a material fact, which he alone has had an opportunity of knowing, and which he is bound in conscience to disclose, and such concealment occasions a loss or injury to the other party, he is entitled to recover an indemnity. *The Newburyport Mar. Ins. Co. v. Oliver et al.* 3 Mass. Rep. 402.

If an action in the nature of a writ of conspiracy be brought against two persons, and one is acquitted, and the other is found guilty, judgment shall be entered against that one, and the acquittal of the other forms no ground for a new trial, or in arrest of judgment. *Eason v. Westbrook*, 1 Tayl. Term Rep. 207.

In an action for a deceit in selling an unsound horse, the narr. should allege, either that the vendor falsely and fraudulently represented the horse sound, or that he knew him to be unsound, and represented him sound. *Baldwin v. West, Hardin's Rep.* 50.

If a representation be fair and honest as to the belief of a person making it, and

cumstances of another, and the safety of trusting him, says that he is a man of credit, and one who may safely be trusted; and it afterwards turns out, that the person of whom he so spoke was at that time a man of no property; no action is maintainable on this false assertion, unless it be proved that the defendant knew at the time he made it, that he was giving a false character of the person respecting whom inquiry was made. (1) Even where the defendant, on repeated applications being made to him, said that, *to his own knowledge*, (2) the third person was a lady of considerable fortune, and of larger expectations, whereas it turned out that she was a mere swindler; yet as the defendant really believed the representations which she had made to him, and had been himself duped by the appearance she made in the world, the action was held not to be maintainable; for the assertion of knowledge, when taken with reference to the credit and circumstances of another, means nothing more than a strong belief founded on reasonable and probable grounds.

Ch. VI. s. 1.
Deceit.

(1) *Pasley v. Freeman*, 3 T. Rep. 51.
(2) *Tapp v. Lee*, 3 Bos. & Pul. 367.

(2) *Haycraft v. Creasy*, 2 East, 92.

without concealment, such a person would not be liable. *Barker v. Sutherland*, *Addis. Rep.* 123.

In an action of deceit, the defendant may give in evidence, his own character. *Rumsey et al. v. Lovell*, 1 *Anth. N. P. Cus.* 17.

A. being a man of responsibility, borrowed of *B.* his brother in law, a sum of money, and as security, conveyed to him by an absolute deed, a valuable real estate, which, according to the understanding of both was to be re-conveyed on the payment of the money borrowed. *C.* and *D.* formed a conspiracy against *A.* to ruin him in business; and in pursuance of such conspiracy, applied to him and proposed to lend a further sum, of which he was in want, to pay *B.*'s debt, and to hold the conveyed property as security for both sums. They then went to *B.* and falsely and fraudulently told him that they had made the proposed advances to *A.* in consequence of which, *B.* conveyed the real estate to them. They then represented to the creditors of *A.* that he was a bankrupt, and advised them to attach his property, in consequence of which his ruin was accomplished. It was held that *A.* could recover against *C.* and *D.* in an action on the case. *Bulkeley v. Storer*, 2 *Day's Rep.* 531.

In an action of deceit in the nature of a conspiracy, the acts and declarations of an alleged *particeps* in the fraud, cannot be admitted in evidence to the jury, until a privity between him and the defendant is first shewn to the satisfaction of the Court; but when such privity is proved, the most liberal latitude will be allowed in shewing the conduct and confessions of the *particeps*. *Windover et al. v. Robbins*, 2 *Tyl. Rep.* 1.

In an action for a conspiracy to deceive, by representing *A.* to be a man of property who was in fact a bankrupt, evidence, that the defendants made such representations to other persons than the plaintiff, in consequence of which, such persons, without the request of the defendants recommended *A.* to the plaintiff, whereby the plaintiff was induced to give him credit, is admissible. *Gardner v. Preston*, 2 *Day's Rep.* 205.

As to the effect of a letter of credit, in favour of third persons against the writer, *Vide Eddowes et al. v. Nell*, 4 *Dull. Rep.* 133. *Laurason v. Mason*, 3 *Cranch's Rep.* 493. *Robins v. Bingham*, 4 *Johns. Rep.* 476. *Rogers et al. v. Warner et al.* 8 *Do.* 92.—*Am. Ed.*

SECTION II.

Actions founded in negligence.

Part II.
Sect. 2.
Negligence.

- We had occasion in the last section to observe, that in those cases where a man officiously intermeddles with the character or circumstances of his neighbour, the law implies malice, and that the *onus* is cast on him to prove his innocence; while, on the other hand, when he appears to have acted in the regular course of business, as in answering an inquiry which has been made by a third person, or the like, it is incumbent on the party complaining to give express evidence of malice. The same principle applies to those actions which are founded in negligence. If one man keep a lion, a bear, or any other wild and ferocious animal, and such animal escape from his confinement, and do mischief to another, the owner is liable to make satisfaction for the mischief so done, without further evidence of negligence in him; for every person who keeps such noxious and useless animals must keep them at his peril.(1) On the contrary, if a man has a dog, a bull, or any other domestic animal, such as are usually kept, and are, indeed, necessary to the existence of man; no action is maintainable for any damage done by such animal, without proof that the owner knew that he was accustomed to do mischief; for without such knowledge, no negligence or fault is imputable to the defendant.(2) In this case, therefore, the plaintiff must not only prove the damage which he has sustained, but he must also prove that the animal had before done mischief, and that the defendant, having knowledge of that fact, permitted him to go about; for merely keeping him in his own yard, for the protection of his premises, in the night, though not chained, will not subject him to an action.(3) But when it is proved that the animal had once done mischief of any kind, and that the owner, after knowledge thereof, permitted him to go at large; he will be answerable for all other damages done by him, though of a different kind from that which he had before committed;(4) and, therefore, where a dog accustomed to worry sheep was permitted to go at large, and afterwards bit a horse, the owner was held to be liable.(5) So, the first fault being in the owner, in permitting the animal to be at large after he knew of his mischievous disposition, he will be equally liable to the action, though, in the particular instance, the party injured has
- (1) 2 Ld. Raym. 1583.
- (2) Ibid. Jenkins v. Turner, Salk. 662. 1 Lord Raym. 109. S. C.
- (3) Broek v. Copeland, 1 Esp. 203.
- (4) 12 Mod. 555.
- (5) 1 Ld. Raym. 110.

been negligent or imprudent.(q) Thus, where a person trod upon a dog which was lying at the owner's door, and the dog bit him in consequence, yet it being proved, that the owner knew he was accustomed to bite, the action was held to be maintainable.(1) And, in a late case, where a dog having been bitten by one that was mad, the owner fastened him up, and a child coming near him irritated him with a stick, upon which the dog flew at and bit him, in consequence whereof the child had the hydrophobia and died; Lord KENYON held, that the father might maintain an action against the owner for the expenses of the apothecary; because it was the duty of the owner to have destroyed the dog immediately that he knew him to be in danger of so fatal a malady, or at least to have kept him in a place where he could not by possibility have done mischief.(2)

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Negligence.

(1) *Smith v. Peiah*, 2 Stra. 1264.

(2) *Jones v. Perry*, M. S. 2 Esp. Cas. 482, S. C.

In these cases there was great negligence in the defendant, but where an action was brought for an obstruction in the highway, by reason whereof the plaintiff's horse fell and he was hurt, it appearing that the plaintiff was riding with great violence, and might have avoided the obstruction with common prudence, the action was determined to be not maintainable;(3) and in another action of the like nature, where the plaintiff's gig was overturned by reason of his horse taking fright at some rubbish laid in the road by the defendant's workmen, but it appeared that the plaintiff himself managed the horse unskilfully a similar decision was made by the Court.(4)

(3) *Butterfield v. Fox*, 11 East, 60.

(4) *Flower v. Adam*, 2 Taunt. 314.

The case of the unruly horse, which, being driven in Lincoln's-inn-fields for the purpose of breaking, got loose and struck the plaintiff, was determined on the same principle; the action was holden to be maintainable, because there was a degree of negligence in attempting to break a young horse in so public a place;(5) but had it not been for this negligence the action could not have been supported; and therefore, if a ship be navigating a public river, or a carriage travelling on a public road, and notwith-

(5) *Michel v. Alestree*, 2 Lev. 172. S. C. 1 Vent. 295.

(q) Any person is justified in killing a ferocious and dangerous dog, which is permitted to run at large by its owner, or escapes through negligent keeping, the owner having notice of its vicious disposition. *Putnam v. Payne*, 13 Johns. Rep. 312.

Any one is justified in killing a dog which has been bitten by another mad animal. *ibid.*

Quere, Whether that would be a justification for killing more useful and less dangerous animals. *ibid.*

Trespass *vi et armis* will lie for killing a dog set to mind property, if there be no justifiable cause. *Bowers v. Fitzrandolph*, *Addis. Rep.* 215.

But where the dog was a nuisance, and had bitten the defendant, the law will allow him to kill the dog. *ibid.*—AM. ED.

standing all due care and attention in the person steering the ship, or driving the carriage, it runs against another and does damage, no action lies against the owner. In these cases, therefore, it is incumbent on the plaintiff to shew negligence in the defendant or other person under whose care or conduct his ship or carriage was.

- Horses and carriages being generally trusted to the care of a servant, the very possession of them by such servant is evidence that they were about the business of the master, and makes him liable to an action for any injury arising by the negligence of his servant.(1) But this is not conclusive upon the defendant, for if he prove that the horse or carriage was taken out of the stable by the servant in defiance of his orders to the contrary, this evidence shewing that the servant was not then in the due employment of his master, discharges the master from the general liability for the acts of the servant;(2) and in like manner, where a servant, driving his master's carriage, in which no person was, wilfully and maliciously drove against the carriage of another, it was held, that the master was not liable for this wilful act of his servant, as he would have been for any act of negligence or unskilfulness in the regular discharge of his duty;(3) and even where a master of a ship was on board at the time an injury was done to another ship by the wilful misconduct of a sailor, it was held that he was not answerable.(4)(r)

(2) *Semb. per Buller J.*
3 T. Rep. 762.

(3) *M'Manus v. Cricket*,
1 East. 106.

(4) *Bowcher v. Noidstron*
1 Taunt. 568.

(r) An action will not lie against the master of a vessel, for running his vessel against, and injuring another, the defendant himself being on shore, and a pilot on board. *Snell et al. v. Rich*, 1 Johns. Rep. 305.

Quere, Whether the owners of a ship are liable for the conduct of a pilot. *ibid.*

Trespass and not case is the proper action to recover damages for an injury sustained by the negligent driving of the defendant's horse. *Waldron v. Hopper*, 1 Coxe's Rep. 539.

It is proper against the master of a vessel for running through a fishing net. *Post v. Munn*, 1 South. Rep. 61.

If *A.* sets fire to his fallow land, as he is a right to do, which communicates to, and fires the woodland of his neighbour, no action lies against *A.* unless there was some negligence or misconduct in him or his servant. *Clark v. Foot*, 8 Johns. Rep. 329.

One hired to drive horses, is liable only for negligence, unskilfulness, or wilful misconduct, the burthen of proving which lies on the driver. *Newton v. Pope*, 1 Cowen's Rep. 109.—Am. Ed.

SECTION III.

Actions for disturbance, &c.

IN actions for *disturbances* and *nuisances*, the plaintiff must prove his possession of the land or house which has been injured, and carry his evidence of the state and situation of the premises, and the enjoyment of the right, as far back as possible; (s) for in cases where there is no actual grant, usage and prescription must settle the right of the parties. (t)

In general the proof of twenty years undisputed enjoyment of commons, lights, pews, ways, or other easements appurtenant (1) to a house or land, and in some cases a much less time, will be sufficient to raise the presumption of a prescription or grant; (2)* and if *A.* being possessed of two houses, sell one to

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and nuisance.

(1) Lewis v.
Price, cor.
Wilmot J.
Worcester
Sp. Ass. 1761,
M. S. cited
also 2 Will.
Saund. 175, a.

(2) Darwin
v. Upton, 2
Will. Saund.
175, d. and
several other
cases there
cited.

(s) Some actions which would otherwise be nuisances, may be justified by necessity. Thus a man may throw wood into the street for the purpose of having it carried into his house, and it may lie there a reasonable time. *Commonwealth v. Passmore*, 1 Serg. & R. Rep. 217.

An indictment for a nuisance, in obstructing an ancient water course, whereby a public highway was overflowed and spoiled, need not state how far in length or breadth the water stood on the road. *Respublica v. Arnold*, 3 Yeates' Rep. 417.

So, for erecting a wharf on the public property, the defendant was not allowed to go into evidence, to prove that the matter complained of was beneficial to the public. *Ibid. v. Caldwell*, 1 Dall. Rep. 150.

An action on the case lies against him who erects, and who continues a nuisance erected by another. *Staple v. Spring et al.* 10 Mass. Rep. 72.

Where a public way is unlawfully obstructed, any individual, who has occasion to use it in a lawful way, may remove the obstruction, and he may enter upon the land of the party erecting or continuing the obstruction, for the purpose of removing it, doing as little damage as possible to the soil or the buildings. *The Inhabitants of Arundel v. Mc Culloch*, 10 Mass. Rep. 70.

To support an action on the case for damages occasioned by a common nuisance, it is not necessary that the damage sustained, should have been direct; it is enough if it was consequential. *Hughes v. Heiser*, 1 Binn. Rep. 463.

In an action for a nuisance by overflowing the plaintiff's lands, the damages ought to be competent for the demolition of the thing erected that occasions the nuisance; sometimes the profits of such erections are of great value, when the object of the law can only be obtained by damages equivalent to the profits gained by the erection, or by damages to such an amount as will render those profits not worth pursuing. *Bradley v. Amis*, 2 Hayw. Rep. 399.—AM. ED.

(t) A right of way may be by grant or prescription, and convenience gives no right. *Seabrook v. King*, 1 Nott & McCord's Rep. 140.—AM. ED.

* In *Bealey v. Shaw*, 6 East, 214, Lord ELLENBOROUGH said, that twenty years exclusive enjoyment of water, in any particular manner, affords a conclusive pre-

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B. and the other to *C.* one purchaser cannot so alter his house as to obstruct the windows of the other, however recently they may have been opened.(1)

(1) *Drummond v. Do-
raut*, K. B.
822. at West-
minster, after
Easter T. 32
Geo. 3.
Compton v.
Richards,
1 Price. 27.

assumption of right in the party so enjoying it. But less than twenty years enjoyment may, or may not, afford such a presumption, according as it is attended with circumstances to support or rebut the right. In that case, the persons under whom the defendants claimed, had eighty years since erected a mill on their lands, and made a weir to divert water to it out of the river *Irwell*, which weir had been at different times before 1787, enlarged, and thereby a greater quantity of water diverted from the river. In 1787, the plaintiff built a mill lower in the stream, which was supplied by the water not then taken by the defendants weir, and the plaintiff continued to enjoy this surplus water until 1791, when the defendants enlarged their weir and made other works on the river, whereby they took all the water from the plaintiff's mill. The Court held the action maintainable; and Mr. J. LA BLANC said, the true rule is, that if after the erection of works, and the appropriation by the owner of the land of a certain quantity of water flowing over it, the proprietor of other lands takes what remains of the water before unappropriated, the first mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards.

So where a building used as a malt-house, and having lights sufficient for that purpose, was converted into a dwelling-house, and soon afterwards a building was erected which darkened the windows, Lord Chief Baron MACDONALD left it to the jury whether there was sufficient light for a malt-house, saying, that no man could by his own act suddenly impose a new restriction on his neighbour. *Martin v. Goble*, 1 Camp. N. P. Cas. 323.

Another most important case has lately come before the Court, on the subject of water. The plaintiff being entitled to a fishery in the river *Ribble*; and the defendant and his predecessors, proprietors of a mill there, having, till within the last forty years, had a brushwood weir across the river, near their mill, at which weir they had for two hundred years past exercised the right of taking the fish; in the year 1766, the then owner of the mill erected a solid stone weir two-thirds across the river, in lieu of the former brushwood, leaving the other third of the weir composed of the same materials as before. No objection was made to this alteration, and the weir continued in that state till 1784, when the remainder of the brushwood was removed by the defendant, and the stone weir carried quite across the river. The weir was a solid piece of masonry, having three locks as the former wooden weir had, for the purpose of catching fish; but it appeared that since it had been completed, very few fish could pass, so as to be taken in that part of the river where the plaintiff's fishery was. The action was brought within three months before the expiration of twenty years from the last alteration. The jury, under the direction of the Judge, had found a verdict for the defendant; the Judge conceiving, that though this was originally a nuisance to the plaintiff's fishery, yet the length of time which had been suffered to elapse, had established the right of the defendant. The Court, on a motion for a new trial, determined that the direction of the Judge was wrong; Lord ELLENBOROUGH observing, that by Magna Charta, and other Acts of Parliament, the erection of weirs in rivers was a public nuisance; that however twenty years acquiescence might bind parties where private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing.† No objection however of this sort, his Lordship said, could apply to

† A man has a right to use the water which flows through his land, but not to divert it to the prejudice of others. *Marritt v. Parker*, 1 Cox's Rep. 460.

In the same manner as twenty years undisputed enjoyment will give the right, the same length of adverse possession will so far destroy it as to prevent the person originally entitled

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this case, when the action was commenced within twenty years after the complete extension of the stone weir across the river, by which it was proved that the plaintiff had been injured. *Wild v. Hornby*, 7 East, 195. In *Vooght v. Winch*, 2 B. & A. 662, the Court held, that even twenty years possession of water at a given height, was not conclusive in the case of a navigable river.

An action will not lie for diverting the water of a river from its usual course by erecting a mill dam above the mill dam of another, if sufficient water be left to work the lower mill, though in consequence of such erection it be necessary to run the mill dam of the lower mills further into the stream, and the difficulty of getting logs to the lower mills be increased so much as to require one hand more for twenty-five logs. *Palmer et al. v. Mulligan et al.* 3 Caines' Rep. 307. Et vide *Sackrider et al. v. Beers et al.* 10 Johns. Rep. 241. *Merritt et al. v. Bruckerhoff et al.* 17 Do. 306.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion not only of the soil, but of the space above, and below the surface, to any extent he may choose to occupy it; provided he so use his own, as not to injure the property, or impair any existing rights of another. *Thurston v. Hancock et al.* 12 Mass. Rep. 220.

Where persons have an equal right to erect mill dams on a river, the rubbish which comes from a newly erected upper dam to an old lower dam, though it be an inconvenience to the lower dam of about two hundred and fifty dollars a year, will be *damnum absque injuria*, if a jury have found in favour of a defendant, and it appear the floating rubbish of the defendant be lessened by the erection of the upper dam. *ibid.*

A. granted eighty-six acres of land to B. reserving the streams of water and the soil under them, with the right of erecting mill dams, and all such part of the land as shall be overflowed by water, for the use of mills for the grantor, and B. sold forty acres of the premises to C. with the like exceptions, and C. erected a dam on his part of the land, by which the land of B. was overflowed, it was held until A. exercised his right and erected dams, the reservation was inoperative, and if considered strictly as an exception, would be void for uncertainty. *Thompson v. Gregory*, 4 Johns. Rep. 81.

Where a company is authorised by an Act of the Legislature to cut a canal, no action will lie against them by the owner of the land, through or near which the canal is cut, for injuries to his land, arising necessarily from the act of making it, or from its contiguity; the defendants having proceeded according to the directions of the Legislature; but they are liable only for such damages as results from their neglect in keeping the canals and embankments in repair. *Steel v. Western Inland Navigation Co.* 2 Johns. Rep. 283.

A previous occupancy of land on a stream of water, and the appropriation of the water for the purposes of a mill, does not give such a right to the stream, in its whole extent above, as to control the use of the water, so as to prevent any subsequent occupant from using or detaining the water, to the injury or prejudice of the first occupant; it not appearing that the plaintiff had been so long in the previous use and enjoyment of the stream, as to afford a presumption of a grant of the same beyond the bounds of his own land. *Platt v. Johnson et al.* 15 Johns. Rep. 213.

Every man has a right to erect a mill upon his own land, and to use the water passing through his land as he pleases, provided that his mill is not so constructed

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(1) *Hawke
v. Bacon*,
2 Taunt. 156

(2) *Holeroff
v. Heel*, 1
Bos & Pul.
400.

from abating the nuisance, or maintaining a possessory action for erecting it; and therefore, where a common has been adversely possessed in severalty by an inclosure during that time,(1) or the grantee of a market(2) permits another person to erect another market in his neighbourhood without objection, and such new market is enjoyed for twenty years, neither the commoner nor the owner of the market will, after that time, be permitted to abate the nuisance or maintain an action on the case for the invasion of his right.(u)

When the right is claimed by prescription, (and it is only in the case of copyholds that it can be claimed by custom,) the evidence must go to shew the exercise of the right by the occupier of the particular land to which it is said to be appurtenant,

and employed as to injure his neighbour's mill, and that after using the water, he returns the stream to its ancient channel. *Beissell v. Sholl*, 4 Dall. Rep. 311.

Where the plaintiff claimed the privilege of a water course, which the defendant had vexatiously impeded, the Court directed the jury to give large damages, the plaintiff's counsel agreeing to release them in case the privilege was duly secured by deed. *Clyde v. Clyde*, 1 Yeates' Rep. 92. *Anon.* 4 Dall. Rep. 147. S. C. by name of *Walker v. Butz*, 1 Yeates' Rep. 574.

Where A. had a fulling mill on the same stream with, and above B's grist mill and A's mill had been erected and in operation for more than twenty years after B's mill was built, it was held that A's uninterrupted enjoyment of the stream above, for that length of time, had given him such a right to the water, that B. could not raise his dam, and thereby throw back the water upon A's wheel. *Sherwood v. Burr et al.* 4 Day's Rep. 244.

A man owning a close bounded on an ancient brook, may lawfully use the water thereof for the purpose of husbandry, as watering his cattle, or irrigating his close; and he may do this, either by dipping water from the brook, and pouring it upon his land, or by making small sluices for the same purpose; and if the owner of a close be damaged thereby, it is *dammum absque injuria*, and no action lies. *Weston v. Alden*, 8 Mass. Rep. 136.

In an action for obstructing a water course by which the plaintiff's meadow was watered, it appeared the defendant had purchased a mill with notice that the vendor had before sold the meadow in question to the plaintiff, covenanting that the plaintiff might use the water over and above what was necessary for the mill; the plaintiff obstructed the water course; the Court recommended the defendant to secure to the plaintiff by deed the enfranchisement of the water course, which he refused; the plaintiff bound himself to release any damages given if the defendant should execute such a deed, and the jury thereupon, with the advice of the Court, found damages to the full value of the land. *Anon.* 4 Dall. 147.

By a sale of mills, the water of the race will pass; if the water in the stream be owned by ten persons whose lands are on opposite sides, and they agree to erect mills on the lands of one, and turn the whole stream to the mills; it is an appropriation of the water of the mills, and a release of one tenant in the mill will pass his right in the water also. *Wetmore v. White et al.* 2 N. York Cas. in Ex. 87.—*Am. Ed.*

(u) *Thurston v. Hartcock*, 12 Mass. Rep. 220. *Story v. Odin*, *ibid.* 157.—*Am. Ed.*

for evidence that all the tenants of a manor have enjoyed it, is, Ch. VI. s. 3. in such case, not admissible.(1) And we have before seen,(2) Disturbance and nuisance. that in these cases of mere private prescription no evidence of reputation is received.(x) But when to a plea of a prescriptive (1) *Wilson v. Page*, 4 Esp. Cas. 71. right of common, the plaintiff replied another prescription to use the *locus in quo* for tillage with corn, and until the carrying to hold and enjoy the land, the Court held that many other persons having a right of common on the close, evidence of reputation, might be received of the plaintiff's right, a foundation being first laid by proof of the enjoyment of it.(3) (2) Ante, 28. (3) *Weeks v. Sparkes*, 1 M. & S. 679.

The plaintiff must also shew that the right is to the extent claimed. A person who has a right of way to his own close cannot, when he purchases a close beyond it, use the way for the purpose of going over his own close and thence to the land newly purchased ;(4) and if the usage has only been to go with carts and horses, this will not, on an application of the land to other purposes, necessarily entitle the party to drive horned cattle through it, though it may be evidence of such a right, if fortified by other circumstances.(5)(y) (4) *Laughton v. Ward*, 1 Lutw. 111. (5) *Ballard v. Dyson*, 1 Taunt. 279.

The defendant, in answer to this, may shew that the enjoyment was by the connivance or consent of one who had only a temporary interest in the estate, out of which the easement is claimed; and this will avoid the right which would otherwise arise from the usage. Thus, if a tenant for life or years permit a stranger to use a way, &c. through a close, this will give no title whatever, as against the remainder man, who ought not to be bound by his fraud or laches.(6) So if the usage has been merely by favour, and acknowledged as such; as if a small rent has been paid to the defendant for it; or he has locked the gates when he thought proper, and kept the key; or done any other act which shews that the plaintiff did not claim it as a right, it will be proper evidence, on the part of the defendant, to counteract the effect which the usage unexplained would produce. (6) *Bradbury v. Grinsell*, 2 Wil. Saund. 155, d. Vide *Campbell v. Wilson*, 3 East. 394. *Daniel v. North*, 11 East, 272.

In these cases the plaintiff is not obliged to prove any specific injury to himself; that he has a right, and that such right has been *wilfully* invaded by the defendant, is sufficient; for if he were to wait until he could prove actual damage, the defendant

(x) In general, the presumption of a grant is limited to periods analogous to those of the Statute of Limitations, in cases where the Statute does not apply. *Ricard v. Williams et al.* 7 Wheat. Rep. 59.—AM. ED.

(y) Where land is granted with a right of way, the right is appurtenant to every part of the land, and the grantee of any part, no matter how small, is entitled to it. *Watson v. Biorren*, 1 Serg. & R. Rep. 227.—AM. ED.

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(1) *Wells v. Watling*, 2 Black. 1233. Hobson v. Todd, 4 T. Rep. 71. by repeated invasions of a right, which can only depend on usage, might himself gain a title which could not afterwards be successfully opposed.(1) In actions, therefore, by a commoner against a stranger, proof of the plaintiff's right of common, and that the defendant's cattle were turned thereon by him,(2) or that he took the dung away,(3) is sufficient; but if the action be brought against the lord, or a third person, who puts cattle on the common by his license, the plaintiff must also prove a specific injury, as that there was not sufficient common left; at least, if the defendant prove the contrary, it will be an answer to the action.(4)

(2) *Ibid.*

(3) *Pinder v. Wadsworth*, 2 East, 154.

(4) *Per Buller J.* 4 T. Rep. 73.

There is one case where, though the form of action is *trespass*, yet the proof will be the same, and governed by the same rules, as the above actions on the case; that is, the case of a fishery. *Prima facie* the right of the fishery will be in the owner of the soil;(x) and, therefore, the first point will be, to prove property in it; this, in cases of rivers not navigable, is in the owners of the land on each side, to the middle of the river;(5) but in navigable rivers and arms of the sea, the presumption is that the soil is in the crown, and that every subject of the realm has a right to fish. In both cases, however, the *prima facie* right may be rebutted, and a person not the owner of the soil in the one case, or an individual in the other, may have the fishery by prescription;(6) and as usage is so important, proof of an attempt to catch fish, though unsuccessful, will be sufficient evidence in an action for disturbance in a *several* fishery.(7)

(5) *Patrik v. Greenway*, 1 Williams's Saunders, [346, b.]

(x) The owners of lands on the banks of the *Susquehanna* have no exclusive right at common law, or by grant from the proprietaries, to fish in the river immediately in front of their lands, but the right to fisheries in that river, is vested in the State, and common to all. *Carson v. Blazer et al.* 2 Binn. Rep. 475.

The Legislature have the right to regulate the taking of fish within the State, and to oblige all persons to conform to the regulations by inflicting penalties for the violation of them. *Burnham v. Webster*, 5 Mass. Rep. 266. *Nickerson v. Brackett*, 10 Do. 212.

By the principles of the common law, a town has no right of property in a fishery within its limits, but the property is in the public. *The Inhabitants of Randolph v. The Inhabitants of Braintree*, 4 Mass. Rep. 315. *Coolidge v. Williams*, *ibid.* 140.—*AM. ED.*

CHAP. VII.

OF THE EVIDENCE IN THE ACTION OF TROVER.

Ch. VII.
Actions of
trover.

THERE is another action on the case, which, being governed by a rule of pleading not admitted in the former, I shall mention in a distinct chapter. In the action of *trover*, the plaintiff does not truly state his case, but is permitted to use a fiction, and to say that he *lost* the goods, the value of which he seeks to recover; and that the defendant *found* them and *converted* them to his own use.

The general issue *not guilty* is the plea also used in this action, but nevertheless, the plaintiff is not put to prove the formal and fictitious part of his case. He must prove either a general and absolute property, and right of possession, at the time of the conversion, (in which case he is not obliged to prove any actual possession of the goods, for the legal possession follows the property;) (1) or else he must shew that he has a special property which renders him answerable to the true owner; and that at the time they came into the defendant's hands, he had also the actual possession of them. (2) (a)

(1) Bul. N.
P. 33. 7 T.
Rep. 13.(2) Bul. N.
P. 33.*Trover.*

(a) It cannot be maintained but by him who has a property in the goods, either general or special. *Waterman v. Robinson*, 5 *Mass. Rep.* 303. *Ludden v. Leavett*, 9 *Do.* 104. *Warren v. Leland*, *ibid.* 265. *Hotchkiss v. M^r Vickar*, 12 *Johns. Rep.* 403.

Or he must have the actual possession or the right to immediate possession. *Mather v. Trinity Church*, 3 *Serg. & R. Rep.* 509. *Thorp v. Burling et al.* 11 *Johns. Rep.* 285. *Bird et al. v. Hempstead*, 3 *Day's Rep.* 272.

An administrator may maintain trover for the conversion of the intestate's goods in his life-time. *Fowle adm. v. Lovet*, 6 *Mass. Rep.* 394.

Where a special property is sufficient, vide *Kinder et al. v. Shaw et al.* 2 *Mass. Rep.* 398. *Caldwell v. Euton*, 5 *Do.* 399. *Floyd v. Day*, 3 *Do.* 403. *Ludder v. Leavitt*, 9 *Do.* 104. *Gibbs v. Chase*, 10 *Do.* 125. *Thorp v. Burling*, 11 *Johns. Rep.* 285. *Schermerhorn v. Van Valkenburgh*, *ibid.* 529.

Where goods are seized by virtue of legal process, and are in the custody of the law, trover will lie for them. *Jenner v. Jolliffe*, 9 *Johns. Rep.* 381.

It lies for wild geese which have been tamed and have strayed away, but without regaining their natural liberty. *Amory v. Flynn*, 10 *Johns. Rep.* 102.

In an action of trover, the plaintiff must shew property in himself. *Shelden v. Sooper*, 14 *Johns. Rep.* 352.

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Actions of
Trove.

But a person who has not the right to the immediate possession, but only a reversionary interest, cannot maintain trover; and therefore a man who has let his house ready for

Trover will lie for title deeds. *Weiser v. Zeisinger*, 2 Yeates' Rep. 5.

A joint owner entitled to exclusive possession, may sue alone. *Thompson v. South*, Rep. 580.

It lies for cutting and carrying away corn standing and growing. *Nels v. 15 Mass. Rep.* 204.

It cannot be maintained on the possession of a chattel, where it appears title is in another, and the plaintiff has only a trust. *Laspeyre v. M. Tayl. Term. Rep.* 187.

But it may where one has the absolute right, although he never had action. *M. Calla v. Bullock*, 2 Bibb's Rep. 238.

This action will lie for property tendered on a note, in favour of the person to whom the tender was legal. *Rix v. Strong*, 1 Root's Rep. 55.

It will lie against the drawer of a note which he got up through the hands of a third person. *Nettleton v. Riggs*, *ibid.* 125.

It will lie when brought by the rightful owner of public securities, if they have been delivered up upon a forged order. *Griswold v. Judd*, *ibid.* 2.

A purchaser of one, who has a special property, may maintain trover against the world, except the right owner. *Hughes v. Giles*, 1 Hayw. Rep. 26.

A right of privilege in a cargo does not give such an interest as will support trover, if the consignee has not consented to the sale of those parts which are purchased. *Heyl v. Burling*, 1 Caines' Rep. 3.

This action will not lie for money which is the medium of commerce. *al. v. Emory*, 2 Dall. Rep. 51.

Whether it will lie for a ship and cargo taken on the high seas? *T. Sweet et al. ibid.* 81.

Where a note is paid to one of the payees, and a receipt in full given, it was held to be a thing of no value for which an action of trover would lie. *Todd v. Crookshanks*, 3 Johns. Rep. 427.

But it will lie for a note in the hands of a third person. *ibid.*

In some cases, trover is alone the proper action, in some trespass, in some cases trover or trespass may be brought indifferently, and in these cases of trover may be brought where trespass would have lain, but is barred by the Statute of Limitations, which does not include actions of trover. *Ferris v. Root*, 1 Root's Rep. 365.

An action of trover waves the trespass in taking, admits the possession lawfully gotten, and proceeds to recover damages for the unlawful conversion. In trespass, damages may be given for the taking. *Hall v. Moor*, *Add.*

Quere, Which is the proper action, to be brought by the owner, if the goods are out of the hands of a third person. *ibid.*

In trover, the plaintiff must shew property in himself. *Sheldon v. Sop*, Rep. 352. Et vide *Carter v. Simpson*, 7 Do. 535.

A fundamental distinction between trover and trespass is, the one is for property, the other on possession, hence a recovery in trover vests the property in the plaintiff. *Hostler's adms. v. Skull*, *Tayl. Rep.* 152. *S. Rep.* 139.

A recovery in trespass is no bar to an action of trover, unless the property comes into question, and been decided upon. *ibid.* Sed contra. *Johnson v. Ker*, 1 Nott & M. Cord's Rep. 1.

When it is said possession alone will give a sufficient right to maintain

or hired his goods to another able to contract for them, cannot maintain this action against a third person who seizes the goods;(1) but where the person to whom the goods were let was a married woman living separate from her husband, and therefore unable to gain any property in them, it was held that such a bailment did not deprive the real owner of his action of trover.(2)

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Actions of
trover.

(1) *Gorden v. Harper*, 7 T. Rep. 12. *Pine v. Dor*, 1 T. Rep. 55.

The plaintiff must then prove a *conversion* by the defendant. If it appear that the defendant gained the possession of the goods by force,(3) or that, being entrusted with them, he actually converted them to his own use; as if a carrier draw out part of the liquor in a vessel, this is of itself sufficient, and no further evidence is necessary;(4) but in general where goods come into a man's hands by finding or delivery, it is necessary that a demand of them by the plaintiff, and a refusal to deliver them by the defendant, should be proved to shew a conversion by him. This refusal is always evidence of a conversion, unless explained by the defendant;(5) but a refusal by a mere servant or agent, without the special directions of the defendant, will not make him liable.(6)(b)

(2) *Smith v. Plomer*, 15 East, 607.

(3) *Baldwin v. Cole*, 6 Mod. 312. B. N. P. 44.

(4) *Richardson v. Atkinson*, 1 Stra. 576. *Vide Mulgrave v. Ogden*, Cro. El. 219.

(5) B. N. P. 44.

(6) *Pothonier v. Dawson*, 1 Holt. 384.

against all persons except the rightful owner, it means a possession accompanied with a general or special property, whether by finding or a bailment from the true owner. *ibid*.

In an action of trover, *interest* on the value of the chattels from the time of conversion may be allowed by way of damages. *Wilson et al. v. Comine*, 2 Johns. Rep. 280.

In an action of trover, the *value* of the property, and *compensation* from the time of demand, must be the measure of damages. *Buford v. Fannen*, 1 Bay's Rep. 273.

The measure of damages is the value of the goods at the time and place of conversion. *Kennedy v. Strong*, 14 Johns. Rep. 128. *Baldwin's adm. v. Munro et al.* Anth. N. P. 156. *Jacoby et al. v. Laussatt*, 6 Serg. & R. Rep. 300. *Lillard v. Whitaker*, 3 Bibb's Rep. 92.

The measure of damages, in trover, for a note is its nominal value, unless that be reduced by shewing payment or the insolvency of the maker or some facts to invalidate the note. *Ingalls v. Lord*, 1 Cowen's Rep. 240.

Trover for fraudulently obtaining goods, vide *Woodworth v. Kissam*, 15 Johns. Rep. 186.

In an action of trover, the declaration need not state the price of the things converted, although it is otherwise in *detinue*. *Pearpoint v. Henry*, 2 Wash. Rep. 248.

If after a bailment of goods they are unlawfully converted or detained, *detinue* or *trover*, and not *replevin*, is the proper remedy. *Meany v. Head*, 1 Mason's Rep. 319.

In *detinue*, the plaintiff must prove property in himself, and possession in the defendant. *Burnley v. Lambert*, 1 Wash. Rep. 398. *Merrit v. Warmouth*, 1 Hargr. Rep. 12. *Flowers v. Glasgow*, *ibid*. 122. *Lewis v. Williams*, *ibid*. 150. *Arnold v. Bell*, *ibid*. 396. *Walker's adms. v. Hawkins*, *ibid*. 398.—A. E. D.

Conversion.

(b) Where one hires a horse to go to a certain place, and he goes beyond that

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Actions of
trover.

(1) *Armory
v. Delamirie*,
1 Stra. 505.

The defendant may, on the *general issue*, controvert the plaintiff's property, by shewing a better title in himself, or in a person on whose behalf he defends ; (c) but if the plaintiff has possession, a mere stranger cannot object to his want of title, and, therefore, it is no defence to prove that the plaintiff found the property ; (1) or was himself an uncertificated

place, he is liable in *trover* for an unlawful conversion of the horse. *Wheeler v. Wright*, 5 Mass. Rep. 104.

The admission of defendant that he had the goods and has lost them, is evidence of conversion to maintain an action of trover. *Laplace v. Dupoir*, 1 Cas. 406.

A demand of payment or satisfaction generally for the goods, is sufficient in a case. *ibid.*

A refusal to deliver up goods, is evidence of conversion. [*Judah et al. v. Johns*. Cas. 411.

But though demand and refusal be evidence of conversion, yet if a conversion be proved in any other way, it will not be necessary. *Horsefield v. Cook* Rep. 152.

But a demand of a horse from the wife or servant of the defendant, and will be no evidence of a conversion. *Storm v. Livingston*, 6 Johns. Rep. 41.

There must be a conversion proved before the commencement of the sale afterwards by the defendant, will not avail. *ibid.*

Where the defendant promised to return the goods to the plaintiff, and done it, is sufficient evidence of a conversion. *Durell v. Mosher*, 8 Johns. Rep. 123.

If a factor pledges the goods of his principal, it is a conversion. *Kennedy* 14 Johns. Rep. 123.

A tortious taking is, in itself, a conversion, and no subsequent demand is in order to maintain an action of trover. *Farrington et al. v. Payne*, Cas. Rep. 431.

If one have goods in his possession belonging to the estate of an insolvent to deliver them up, on being demanded by the assignees of the insolvent that he has a lien on them for a debt due to him by the insolvent, it is evidence of a conversion to support an action of trover. *Jacoby et al. v. 6 Serg. & R. Rep.* 300.

One who receives goods to keep, and re-deliver to the owner, but delivers over to a third person, or suffers him to take them, is guilty of a conversion. *Wood v. Bull*, 1 Cowen's Rep. 322.

Demand and refusal are *prima facie* evidence of conversion. *ibid.*—A

(c) Storage of goods need not be tendered by the owner when the store is resolved to dispute the right of possession on a different ground. *Murphy v. 1 Anth. N. P. Cas.* 73.

So where the captain of a vessel refused to deliver up goods, assigning that he was ordered by the ship owners so to do, and made no objection to the freight, but whether enough was tendered did not appear, the captain had waived any tender of freight. *Judah et al. v. Kemp*, 2 Johns. Rep. 411.

Under the general issue the defendant may shew, in justification, a right for rent arrear, under which he entered, distrained and sold. *Kline v. Caines* Rep. 275.

He may shew a paramount title in a third person, without connection with that person, in the same manner as an outstanding title is a ground for ejectment. *Schermerhorn v. Van Volkenburgh*, 11 Johns. Rep. 529. *Strong*, 14 Do. 123. *Rotan v. Fletcher*, 15 Do. 207.—AM. ED.

rupt, at the time of the conversion ;(1) or purchased of one who was so ;(2) for, as against every person but the real owner, the possessor has a good title. So the defendant may rebut the evidence of conversion, arising from demand and refusal, by proving that he or the person, on whose behalf he acts, has a lien on the goods for a sum of money, and that the defendant offered to deliver up the goods, on payment of it, for until the lien is discharged, he is not obliged to part with the goods ;(3)(d) and, therefore, in such case the plaintiff must prove a tender of the money due. But if the defendant, on the demand being made, claim to retain them on a different ground, making no mention of the lien, he cannot afterwards object that the money due to him was not tendered.(4) The defendant may also shew that the goods being fairly in his possession were accidentally lost, as if goods are stolen from a carrier, or he otherwise lose them ; for the action is founded on a wrongful conversion by the defendant, and not on mere negligence ; to recover a satisfaction for which the plaintiff must resort to a special action on the case.(5)(e)

The defendant may also, on the *general issue*, prove that he is tenant in common, or joint-tenant, with the plaintiff ;(6) and this will be a defence, unless the plaintiff prove that the defendant has actually destroyed the goods. If one of several joint-tenants, or tenants in common, bring the action against a stranger, this, though it may lessen the damages to the amount of the plaintiff's share on the *general issue*,(7) will not defeat the action, unless pleaded in abatement.(f)

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trover.

(1) Webb v. Fox, 7 T. Rep. 391.
Fowler v. Down, 1 Bos. & Pul. 44.

(2) Laroche v. Wakeman, Peck's N. P. Cas. 140.

(3) Skinner v. Upshaw, 2 Lord Raym. 752.

Yorke v. Greenough, Ibid. 867.

(4) Beardmore v. Sill, 1 Campb. 410.

(5) Ross v. Johnson, 5 Burr. 2825.
B. N. P. 44.

(6) B. N. P. 34, 35. Brown v. Hodges, Salt. 290.

(7) B. N. P. 35.

(d) The right to retain goods for freight, grows out of the usage of trade ; and does not exist where the parties have, by their agreement, regulated the time and manner of paying it, especially where the cargo is to be delivered before the time fixed for the payment of the freight. *Chandler et al. v. Belden*, 18 Johns. Rep. 157.

A factor has a general lien for his commissions and advances. *Urquhart v. McIver et al.* 4 Johns. Rep. 103. *Peisch v. Dixon*, 1 Mason's Rep. 9. *Allen v. Maguire*, 15 Mass. Rep. 490.

But a mere creditor happening to have in his possession specific articles belonging to his debtor, has no lien upon them. *Allen v. Maguire*, 15 Mass. Rep. 490.

As to stoppage in transitu, vide *Scholfield v. Bell*. 14 Do. 40.—AM. ED.

(e) If a trespasser take a chattel into his own possession, and the owner sue and recover damages for the specie chattel so taken, the recovery and execution, will change the property by operation of law, on the principle, that *solutio pretii, emptiois loco habetur*, vide *Curtis v. Great*, 6 Johns. Rep. 168. *Betts et al. v. Lee*, 5 Do. 348.—AM. ED.

(f) An action of trover cannot be sustained by one tenant in common against his co-tenant, unless the property be destroyed. *Webb v. Danforth*, 1 Day's Rep.

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Actions of
trover.

(1) *Armory
v. Delamirie*,
1 Stra. 505.

The delatiff's property person on possession, and, therefore, found the p

place, he is li.
Wheelwright.

The admission of evidence of co
Cas. 406.

A demand a case. *ibid.*

A refusal to *Johns. Cas.*

But though be proved in *Rep.* 152.

But a demand will be no ex

There no sale afterwards

Where it done it, is su

If a factor: 14 *Johns.*

A tortious in order to *Rep.* 431.

If one has to deliver that he has evidence of 6 *Serg. &c.*

One who over to a *Wood v. B.*

Demand

(c) Story resolved to *vett*, 1 *Anti.*

So where that he was order of the from the captain he: 411.

Under the for rent arrears *Caines' Rep.*

He may show with that person ejectment. *See Strong*, 14 *Do*

CHAP. VIII.

OF THE EVIDENCE IN ACTIONS OF TRESPASS AND REPLEVIN.

In *trespass* the general issue is *not guilty*; in *replevin*, *non cepit*; and on these issues only the simple fact of the commission of the trespass, or taking the goods, can in general come in question. If the place be material, as in all local actions it is, the plaintiff must, on these issues, prove that the trespass or taking was at the place mentioned in his declaration; but in actions which are not local, as in trespass committed on the person or personal property of the plaintiff, it is sufficient to shew that a trespass of the kind complained of was committed by the defendant, though at a place different from that named. (1) Every person concurring in the commission of the trespass is deemed a principal, and therefore, though the defendant did not personally interfere, yet if he aided another, (as where a person, having been warned off certain land, conducted other persons to the spot, and waited outside the fence whilst the others went in to shoot the game being therein,) (2) or commanded his servant to commit the trespass, he will be liable to the action. (a)

Ch. VIII.
Trespass and
replevin.

(1) Vide ante,
292.

(2) Hill v.
Wathen, cor.
Laurence J.
Gloucester
Sp. Ass. 1806.

Replevin.

(a) As a general principle, the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it be in the custody of the law, or unless it have been taken by replevin from him by the party in possession. *Isley et al. v. Stubbs*, 5 Mass. Rep. 280.

In an action of replevin, either a special or general property must be shewn. *Waterman v. Robinson*, 5 Mass. Rep. 303. *Ludder v. Leavitt*, 9 Do. 104. *Warren v. Leland*, *ibid.* 265. *Perley v. Foster*, *ibid.* 112.

But not for things affixed to the freehold. *Cressen et al. v. Stout*, 17 Johns. Rep. 116.

In *New York*, this action will lie for any tortious or unlawful taking of goods, and in cases of distress alone. *Pangburn v. Patridge*, 7 Johns. Rep. 140.

So, in *Pennsylvania*, it will lie wherever the plaintiff claims goods in the possession of another. *Weaver v. Lawrence*, 1 Dall. Rep. 156. *Shearick v. Rep. 3*. *Woods v. Nixon*, *Addis. Rep.* 131. *Stoughton v. Rappaport*, 2. Rep. 559.

in *Connecticut*. *Hempstead v. Bird*, 2 Day's Rep. 299.

may be brought against the Sheriff's vendee, to recover chattels in execution and sold. *Shearick v. Rep. 3*. *S. C.* in *Huber v. Shurch*, 9 Rep. 3. *S. C.* in *Hempstead v. Bird*, 13. *Hempstead v. Bird*, 13. Sed vide

Part II.
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in it. In this latter case he waves all other trespasses, and will not be permitted to give evidence of them.(1) In general the declaration should state all the acts which the plaintiff intends to give in evidence, otherwise the defendant might be taken by surprise.(h) There seems formerly this distinction to have been made, viz. that where there were distinct trespasses the plaintiff could only give evidence of that which was stated on the record; but that, where there was one continued trespass,(2) mat-

(1) Vide Bul.
N. P. 86.

(2) Vide 6
Mod. 127,
and cases
cited. Peake's
Cas. 3d. edit.
65, n. (a)

against the person so entering under colour of title. *Hyatt v. Wood*, 4 Johns. Rep. 150.

So if a person, having a legal right of entry on land, enter by force, though he may be indicted for breach of the peace, yet he is not liable for a private action of trespass at the suit of the person who has no right, and is turned out of possession. *ibid.*

In this action, the plaintiff may give in evidence, under the general issue, soil and freehold in himself. *The Proprietors of Monum's Great Beach v. Rogers* 1 Man. Rep. 169.

If the defendant pleads *liberum tenementum*, the plaintiff cannot reply *de injuria sua propria*, but must traverse the title; otherwise if the defence be set up by way of excuse, and not in justification. *Hyatt v. Wood*, 4 Johns. Rep. 150. Vide *Abel v. Abel*, 1 Root's Rep. 549.

Letting land upon shares for a single crop, does not amount to a lease of the land, and the owner alone can bring trespass. *Bradish v. Schenck*, 8 Johns. Rep. 117.

A person cannot bring trespass, unless he has the actual or constructive possession of the goods at the time. *Putnam v. Wyley*, *ibid.* 337. *Dunham v. Snywasant*, 11 Johns. Rep. 569.

Bare possession of a chattel, is sufficient to maintain trespass against a wrong doer. *Hoyt v. Gelston et al.* 13 Do. 141. *S. P. in Er. ibid.* 561.

If a person having title to land, enter with force, he is not liable to an action of trespass. *Joes v. Joes*, 13 Do. 235.

Trespass will not lie for an act done under process, valid on the face of it, and regularly issued by a Court of competent jurisdiction. *Luddington v. Peck*, 2 Cn. Rep. 700.

In an action of ejectment it is no bar that the title of the land demanded was determined between the same parties in an action of trespass. *Comes v. Pryor*, 10v. Rep. 395.

Where a trespasser takes a chattel into his own possession, and the owner sues for and recovers damages for the specific article so taken and detained, the property in the chattel, is by operation of law changed and transferred to such trespasser. *Curtis v. Groat*, 6 Johns. Rep. 168.—Am. Ed.

(h) Where a trespass is laid with a *continuando*, the plaintiff may give evidence of divers acts of trespass within the *continuando*, but if he travels out of it, he must select one act and rest upon that. *Jorammon v. Pierpont*, 1 Anth. N. P. Cas. 42.

Where an entry is followed by an ouster, the party can recover damages only for the mere trespass or entry; but if he makes a re-entry, and lay his action with a *continuando*, he may then recover damages for the *mere profits* or subsequent acts as well as the trespass. *Case v. Shepherd*, 2 Johns. Cas. 27.

In the narr. in trespass for an assault and battery, the plaintiff may allege many things by way of aggravation, which would not of themselves form a cause of action. *Horton v. Monk*, 1 Browne's Rep. 65.—Am. Ed.

ters which were not stated might be given in evidence under the *alia enormia* alleged in the declaration. The former cases proceeded principally on the idea, that matters which would stain the record by their indecency, need not be alleged; and therefore, where trespass was brought for breaking the house, the plaintiff was permitted to prove in aggravation, that the defendant while there debauched the plaintiff's daughter. At the time of this decision it was generally understood, that no action would lie for the latter injury, unless as an aggravation of the other; and therefore the Judges might be inclined to strain a point to let in evidence of that, which was substantially and in truth the cause of action. But, in more modern cases, it has not been permitted to a plaintiff, who complains of an imprisonment of his person, to show that he was stinted in his food⁽¹⁾, or that he caught an infectious distemper,⁽²⁾ without alleging one as part of the trespass, or the other as the consequence of it.⁽³⁾ Still, however, the plaintiff may prove any fact accompanying the trespass, indicative of the motives of the defendant, and which could not be considered as itself a trespass, for the purpose of showing malice in the defendant; and therefore in an action for breaking and entering the plaintiff's close, and searching therein for game, the Judge permitted the plaintiff to prove that the defendant, being a member of Parliament and a magistrate, had, on being warned off the land, used very intemperate language to the plaintiff, and threatened to commit him, and the jury having given 500*l.* damages, the Court of Common Pleas refused a new trial.⁽³⁾

Ch. VIII.
Trespass and
replevin.

(1) Lowden
v. Godrich,
Penke's Cas.
46.

(2) Pettit v.
Addington,
1b. 62.

(3) Meret v.
Harvey,
5 Taunt. 442.

(4) Badkin v.
Powell,
Cowp. 476.

(5) Derisley
v. Nevil, 1
Leon. 301.
Dodd v. Kyf-
fin, 7 T. Rep.
354. Arg-nt
v. Durrant,
8 T. Rep. 403.

If an act be committed by the defendant, which unexplained amounts to a trespass; or, if in replevin, he insist on his right to take the goods, he must justify or avow the trespass or taking on the record, before any evidence can be received in justification of it; but where the act itself without explanation appears to be no trespass; as where the defendant was a mere pound-keeper, and as such received the plaintiff's cattle from a third person, the general issue is sufficient.⁽⁴⁾ There is one case, however, where that which *prima facie* appears to be a trespass, may be justified, on the general issue; and that is, where the land is the freehold of the defendant, or of another by whose order he entered, for here he does not enter on the property of the plaintiff, who is himself a trespasser.⁽⁵⁾ Actual possession, or receipt of rent, is *prima facie* evidence of title.

In actions of trespass, where a right is claimed to an incorporeal hereditament, which must arise by grant or prescrip-

Part. II.
Trespass and
replevin.

- (1) 2 Atk. 137. tion ;(i) the defendant is obliged to state his title particularly. He cannot, as in actions on the case, rely barely on his possession. In general such right is claimed by *prescription* ; and where the usage has been as long as any one can remember, such plea will be supported ; for posterior usage is evidence of the antecedent right ;(1) and therefore a jury will be directed to presume that it has existed, from the commencement of legal memory. But in cases where the origin of the usage can be traced, as if a right was never exercised till within the last twenty or thirty years, though the uninterrupted exercise of it for that time may be sufficient to presume a *grant*, yet it will not support an immemorial *prescription*. In these cases, therefore, a practice has been lately introduced of pleading, in addition to the prescriptive right, a grant, about the time when the usage commenced, from the person then in possession of the land, and that such grant has been lost by accident.(2) The plea must name the person who is supposed to have made the grant, for a general statement that the date and names of the parties are unknown will not be sufficient ;(3) but when the grant is properly pleaded, twenty years undisputed possession will be sufficient to presume it,(4) and the defendant by this mode of pleading has every advantage which he would have, if plaintiff, in an action on the case. k)

(2) Vide Reed
v. Brookman,
3 T. Rep. 151.

(3) Hendy v.
Stephenson,
10 East, 55.

(4) Campbell
v. Wilson,
3 East, 294.

When the defendant pleads a special plea, and issue is joined upon it; the party alleging the affirmative must prove his case. But it behoves those who conduct a cause, on the part of a plaintiff in trespass, to be particularly careful that the pleadings are so framed, as to bring the real case before the jury ; for where a defendant pleads a justification, and concludes with an averment that it is the same trespass, and the plaintiff traverses the cause of justification, if the defendant has any such right or excuse, as that mentioned in his plea, he will succeed ; for the

(i) Trespass *vi et armis* will not lie for the disturbance in the enjoyment of an incorporeal right, but the proper remedy is an action on the case. *Wetmore v. Robinson*, 2 Con. Rep. 529.—Am. Ed.

(k) In *Connecticut*, forty years uninterrupted possession of a highway, is evidence that it was originally laid out. *Canday v. Lambert*, 2 Root's Rep. 173.

So, fifteen years uninterrupted possession of a highway, will be a bar to the town's recovering it for a highway. *Litchfield v. Wilmet*, *ibid.* 288.

A grant of lands under navigable waters to the owners of the adjacent soil, will not be presumed without evidence of long exclusive possession, and use to warrant such a presumption. *Palmer v. Hicks*, 6 Johns. Rep. 133. Vide *Young v. Hawkins*, 1 Har. & M'Hen. Rep. 148.—Am. Ed.

plaintiff will not be permitted to give evidence of any other trespass, though such in fact were the real cause of action. If the trespass were committed in a place not named in the declaration, and the defendant plead *liberum tenementum*, the defendant may apply his plea to any other place, in the same parish, of which he is seised; and to enable himself to prove the trespass to have been committed where it really was, the plaintiff must make a *new assignment*, particularly describing the *locus in quo*.⁽¹⁾ So if a larger trespass were committed than is mentioned in the plea, or than was necessary for the enjoyment of the right claimed; or another trespass were committed at a different time; the plaintiff will be estopped from giving any evidence, unless he state these in a new assignment, the nature and occasion of which is well explained by the learned editor of *Saunders's Reports*, who collects and arranges the numerous cases which are to found on this subject.

Ch. VIII.
New assign-
ment.

Vide Wil-
liams' Saun-
ders, vol. 1.
299, a note 6.
Vol. ii. 5,
note 3.

(1) Where the township in which was the *locus in quo*, has been subdivided before the bringing the action, the trespass may be laid to have been done in the original township. *Renaudet v. Crocken*, 1 *Caines' Rep.* 167.—*Am. Ed.*

CHAP. IX.

OF THE EVIDENCE IN THE ACTION OF EJECTMENT.

SECTION I.

*Of the plaintiff's evidence in general.*Part II.
Entry.

In the action of *ejectment* the defendant is obliged, on his being permitted to defend, to enter into a rule to confess the formal and fictitious part of the case ; viz. the lease to the plaintiff ; that he entered into possession of the premises ; and that the defendant ousted him. Under this condition he is permitted to plead the general issue ; and on that plea the title of the parties is the only matter in controversy. (a)

(a) After a judgment by default against the casual ejector, the landlord may be let in to appear and defend. *Jackson ex. d. Cantine et al. v. Stiles, & Johns. Rep. 493.*

In order to be admitted as a defendant in an ejectment, a privy must be shewn between the applicant and tenant ; it is not enough for the party applying to swear he claims title, and has a real and substantial defence. *Jackson ex. d. Winter v. M'Enoy, 1 Caines' Rep. 151.*

A privy of interest, and not the receipt of rent, is the proper test of the landlord. *Wimer et al. v. Wilcocks et al. Col. & Caines' Cas. in Prac. 62.*

Wherever a landlord means to take defence, he ought to make himself a party on the record. *Clayton's les. v. Alahouse, 2 Dall. Rep. 150.*

When the defendant has taken general defence, and entered into a common rule, he cannot confess *lease, entry, and ouster*, for a *part only* of the tenements laid in the *navr*. but must confess for the whole. *Wilson's les. v. Campbell, 1 Dall. Rep. 126.*

In ejectment, the tenants in possession are the proper defendants, though the landlord will have a right to be made a defendant, lest there should be any collusion between the plaintiff and the tenant. *Herbert v. Alexander, 2 Call's Rep. 508.*

In *New York* it appears that when an ejectment is brought for a vacant possession, a person claiming title may be admitted to defend, notwithstanding the strict *English* principles. *Saltonstall v. White, Cal. & Caines' Cas. in Prac. 86.*

After a judgment by default, against the casual ejector, the landlord may be let in to appear and defend ; and if he be an *alien*, he is at the time he is let in to defend, in season to petition for the removal of his cause into the Court of the *United States*. *Jackson ex. d. Cantine et al. v. Stiles, & Johns. Rep. 493.* Et vide *Jackson ex. d. Vandervoeker v. Stiles, 10 Do. 67.*

The assignee of a mortgage may be let in to defend, as landlord, in the place of the tenant. *Jackson ex. d. Kiss v. Murray, Anth. N. P. 105.*

But as this is a possessory action, the plaintiff must prove such a title in his lessor as authorises him to enter into the land ; for where his right of entry is taken away, or tolled, as the legal

Ch. IX. s. 1.
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Where one of the lessors of the plaintiff is dead, the Court will, on application, order all the counts in the declaration to be struck out in which he is averred to be the lessor. *Ditz v. Butler*, *ibid.* 105. 1 *Johns. Cas.* 392. *S. P. Jackson ex. d. Low et al. v. Reynolds*, 1 *Caines' Rep.* 20. *Col. & Caines' Cas. in Prac.* 155. *Jackson ex. d. Butler et al. v. Ditz*, 1 *Johns. Cas.* 392. *Jackson ex. d. Wilkins et al. v. Bankcraft*, 3 *Johns. Rep.* 259. *Anon.* 2 *Caines' Rep.* 260. *Anon. ibid.* 261. *Davis v. Grainger*, 3 *Johns. Rep.* 259. *Frier et al. v. Jackson*, 8 *Johns. Rep.* 495.

So in *Pennsylvania* the death of the lessor of plaintiff does not abate the ejectment, which is the lessee's action. *Les. of Ferguson v. Smallman*, *Addis. Rep.* 13.

Under the third sect. of the Act of 13th April, 1807, in case of the death of a party in ejectment, the person next in interest, may be compelled to appear. *Darnes v. Welsh*, 7 *Serg. & R. Rep.* 203.

In *Pennsylvania*, ejectment is an equitable action, and wherever Chancery would execute a trust, or decree a conveyance, the Courts of this State, by the instrumentality of a jury, will direct a recovery in ejectment. *Peebles v. Reading*, 8 *Do.* 484.

The Court are the judges, whether the plaintiff is entitled to relief, and of the extent and mode of the relief; the jury are merely to ascertain the facts. *ibid.*

So, in *Virginia*. *Kinney v. Beverley*, 1 *Hen. & Munf. Rep.* 531. *S. P. Purvis v. Hill*, *ibid.* 614.

So, in *Kentucky*. *Robertson v. Morgan*, 2 *Bibb's Rep.* 148.

Where the lessor of the plaintiff dies pending the suit, judgment is to be rendered as if he were still living; and possession is to be given under the control of the Court. *Moorberry et al. v. Marye*, 2 *Munf. Rep.* 453.

But it will abate by the death of the defendant. *Anon.* 1 *Hayw. Rep.* 500.

In *Maryland* it abates. *Howard's les. v. Gardner*, 3 *Har. & M'Hen. Rep.* 98.

Where a person is made a lessor against his consent, and the nominal plaintiff afterwards becomes non-suit, such lessor is not liable for costs, but the attorney who made use of his name. *The People v. Bradt*, 6 *Johns. Rep.* 318.

In *North Carolina*, it seems if a plaintiff in ejectment sue for the whole he cannot recover a part. *Young v. Drew*, *Ibid. v. Harris*, 2 *Hayw. Rep.* 100.

But in *Squires v. Riggs*, *ibid.* 150, it was ruled, if you sue for a moiety, you may recover a third, and if you sue for two moieties under different devises, you may recover two-thirds.

A plaintiff in ejectment may recover part of the land for which suit is brought. *Santee v. Keister*, 6 *Binn. Rep.* 36.

After a plaintiff has obtained judgment for a moiety of the land, he may sustain a new ejectment for the whole, against the same parties, without taking possession, or suing out a writ of possession, or using any means to enforce the former judgment. But if a party after a recovery, harass the defendant by a new ejectment, when he is willing to surrender, such defendant might obtain relief on motion. *Rambler et al. v. Tryon et al.* 7 *Serg. & R. Rep.* 90.

A tenant cannot controvert his landlord's title. *Anderson v. Derby et al.* 1 *Nott & M'Cord's Rep.* 369. Et vide *Wilson v. Weathersby*, *ibid. n.* 373. *Jackson ex. d. Blecker v. Whitford*, 2 *Caines' Rep.* 215.

Tenants in common cannot join in a demise; joint tenants and parceners may. *Konns v. Grayson*, 2 *Bibb's Rep.* 237.

Where the term stated in the declaration has expired, it will be of no importance. *Baker v. Seekright*, 1 *Hen. & Munf. Rep.* 177.

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expression is, and his title turned to a naked right of *action*, a *real action*, and not an ejectment, is the proper remedy.*

(1) Doogl.
484.

In all cases where the party may, by *entry* alone, acquire the *legal possession* of lands, or as Lord MANSFIELD said, where entry is only necessary to *complete his own title*, (1) he may maintain an ejectment without any proof of an *actual entry* by him; for as by the ancient practice of ejectment, before the consent rule was adopted, it was necessary for the lessor of the plaintiff to enter on the land, and there seal a lease; the confession of such lease, according to the modern practice, includes in it all necessary formalities, and, amongst others, the entry into the land for that purpose.

But when a fine *with proclamations* has been levied by a person in *adverse* possession of the land, and having a freehold in it, whether legal or tortious, this fine entirely *divests* the estate of every other person until it is *regained* by one of the means pointed out by the Statute 4 Hen. 7, c. 24. This may be done in the instances of a fine levied by a mere *tenant for life*, or one who has only a *tortious estate*,† either by commencing a *real action*, or *making an entry*, for the express purpose of avoiding the fine, provided this be done within the time limited by that Act of Parliament, viz. within five years after the proclamations made, if the party has a present interest, and is under no legal disability; or otherwise, within five years after the title of the party accrues, or his disability is removed. (2) An entry, there-

(2) Vide post. fore, is necessary in this case, not merely for the purpose of

As to practice in ejectment, vide *Finch v. Kemble*, Col. & Caines' Cas. in Prac. 112. *Fischer v. Van Allen*, *ibid.* 116. *Woodward v. Quackenbos*, *ibid.* 121. *Jackson ex. d. Cramer v. Winter*, *ibid.* 207. *Anon.* *ibid.* 408. *Jackson v. Stiles*, *ibid.* 414. *Jackson ex. d. Cramer v. Stiles*, *ibid.* 483. *Brandt ex. d. McClelland v. Burrows*, *ibid.* 483. *Jackson ex. d. Lawyer v. Stiles*, *ibid.* 484.

For the title to be shown in ejectment, vide *Lane et al v. Reynard et al* 2 Serg. & R. Rep. 65. *Covert et al. v. Irwin et al.* 3 Do. 283. *Les. of Milligan v. Dickson*, 1 Peters' Rep. 435, n. *Bailey et al v. Fairplay*, 6 Binn. Rep. 430. *Vanhorn v. Frick*, 3 Serg. & R. Rep. 278. *Les. of Willink v. Miles*, 1 Peters' Rep. 429. *Les. of Packer v. Gonsalus*, 1 Serg. & R. Rep. 526.

What will be a good deduction of title? *Jenifer's les. v. Baker*, 1 Har. M'Hen. Rep. 57.—AM. ED.

* It is foreign to the plan of the present work to enter into a discussion of the abstruse and intricate doctrine of discontinuance, disseisin, and descents; but it may not be improper to refer the reader to 3 Black. Com. ch. 10. *Taylor dem. Atkins v. Horde*, 1 Burr. 60. *Runnington's Treatise on Ejectment*, 42 to 58, for instructions on this point.

† If tenant in tail levy a fine, the remainder-man can avoid it only by *real action*. *Moore v. Blake*, *Runnington's Ejectment*, 45. Vide *Bul. N. P.* 99.

completing the lessor of the plaintiff's title, but of rebutting that of the defendant,(1) and in order to replace the estate which was so divested; and immediately he has made it the fine is avoided, his estate reverts, and he has the same title as if no fine had been levied. But since the Statute of 4 Anne, c. 16, he must prosecute his entry or claim, by action within a year, otherwise it will not avail.

In this case, therefore, and in this case only,(2) the formal admission is not sufficient, but an *actual entry* must be proved to have been made by the lessor of the plaintiff, or by some person on his behalf, previous to the day of the demise laid in the declaration.(3) This entry must appear to have been made by the command of the lessor of the plaintiff;(4) or at least assented to by him afterwards;(5) though it is said that the bringing of the action is itself sufficient evidence of such assent.(6) The entry must be made on some part of the lands comprised in the fine in the name of the whole;(7) and it should also appear, that the person entering declared that the entry was made for the purpose of avoiding all fines.(8) In cases where an entry could not be made without personal danger, (a case which, in the present improved state of society, can hardly ever happen,) it will be sufficient to prove that a claim was made in the like form, as near the estate as the person making it could come;(9) and, in either case, unless it appear on the record that the action was commenced within a year afterwards, this fact should also be proved in evidence.(b)

Entry.
Ch. IX. s. 1.

(1) Dougl.
484.

(2) Vide Berrington v. Parkhurst, 2 Stra. 1086. Oates dem. Wigfall v. Brydon, 3 Burr. 1895. Goodright dem. Hare v. Cator, Dougl. 477.

(3) Berrington v. Parkhurst, ub. sup.

(4) 9 Rep. 106. a Poph. 108.

(5) Fitchet v. Adams, 2 Stra. 1128.

(6) 1 Williams' Saunders, 319, a.

(7) Focus v. Salisbury, Hard. 400.

(8) See Williams' Saunders, 319, c. also Ford v. Ld. Grey, 5 Mod. 44.

(9) Lit. s. 421.

* A guardian may enter for his ward without command or assent; and, if a remainder-man, or lord, enter in the name of a tenant for life, or copyholder, or the tenant for life, or copyholder, in the name of the remainder-man, or lord, it is also sufficient without command or assent, on account of the privity between those persons; and the like rule holds in respect of tenants in common, joint-tenants, and co-parceners. *Podger's Case*, 9 Co. 106, a.

(b) In an action of ejectment it was held, that an actual entry was not necessary in any case, except to avoid a fine. *Jackson ex. d. Bronck v. Cryslar*, 1 Johns. Cas. 125.

See vide *Lincoln & Kennebeck Bank v. Drummond*, 5 Mass. Rep. 321. Et vide *Jackson ex. d. Hardenbergh et al. v. Schoonmaker*, 4 Johns. Rep. 390.

An actual entry is in no case necessary, except to avoid a fine. *Jackson ex. d. Bronck v. Cryslar*, 1 Johns. Cas. 125.

An entry to avoid the operation of the Statute of Limitations, must be an entry for the purpose of taking possession. *Jackson ex. d. Hardenbergh et al. v. Schoonmaker*, 4 Johns. Rep. 390.

Confession of lease, entry and ouster in ejectment, extends to an entry to complete the title to the action, but not to an entry, which is necessary to regain and re-vest the possession. *Holt's lq. v. Smith*, 1 Har. & M Hen. Rep. 273.

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Entry.

(1) *Smith v. Parkhurst*, 18 Vin. 413

(2) *Jenkins v. Pritchard*, 2 Wils. 45.

(3) *Doe dem. Duckett v. Watts*, 9 East, 17.

Statute of
Limitations.

(4) *Peaceable dem. Hornblower v. Read*, 1 East, 568.

(5) *Orrel v. Maddox, Runnington's Ejectment*, 458.

(6) *Doe dem. Cooke v. Danvers*, 7 East, 299.

A fine levied by a bare tenant *for years*, without having previously obtained a tortious fee, by feoffment or otherwise, does not operate at all against strangers. In such case, therefore, no entry is necessary ;(1) neither is it to avoid a fine at common law without proclamations ;(2) or where the ejectment is commenced before the proclamations are completed ;(3) and if one tenant in common, being in receipt of the whole rents, levy a fine of the whole land, this will not affect the estate of his cotenant, so as to render it necessary to make an entry, unless there be some further evidence of an actual ouster before the fine was levied.(4) What will amount to evidence of an actual ouster, we shall have occasion to mention hereafter.

The Stat. 21 *Jac.* 1, c. 16, enacts, that none shall make *any entry* into lands but within twenty years next after his title shall first descend or accrue ; and from what was said in the commencement of the present chapter, that the plaintiff must shew a right of *entry* in his lessor, it follows that no ejectment can be maintained after that time. Therefore it is *always* necessary for the plaintiff to prove possession in himself, his ancestor, or a tenant within twenty years ; or to account for the want of it, under one of the exceptions allowed by the Statute. But where there has been a lease from an ancestor of the lessor of the plaintiff, it is not necessary for him to shew any payment of rent under it within twenty years, for his title or right of entry does not accrue till the expiration of the lease, and consequently the Statute cannot begin to operate against him till that time ;(5) and if a forfeiture has been committed by the tenant it makes no difference, for he is not obliged to enter for such forfeiture.(6) An adverse possession during twenty years is not merely a bar to the action or remedy, but takes away the right of possession ; and for this reason it is that the defendant need not plead the Statute of Limitations as in other cases ; and on the same principle, in one case, where *A.* being lessor of the plaintiff, proved that he had been in uninterrupted possession for twenty years, and that the defendant entered on the

An entry, to assert a claim to the land, is unnecessary, where the tenant in possession assents to the title of the party. *Pender v. Jonez*, 2 *Hayw. Rep.* 294.

Where a plaintiff has a *title* to land, an *entry* gives *sufficient possession* to maintain trespass ; but where he does not rely on *title*, but only on *possession*, then the possession must be a *possessio petitis*. *Brandon v. Grimkie*, 1 *Not. & McCord's Rep.* 356.

An entry into a part of a tract of land, with a claim to the whole, is equivalent to an entry into the whole. *Jackson ex. d. Gansvoort et al. v. Lunn*, 3 *Johns. Cas.* 109.—*Am. Ed.*

land, it was holden that this possession of *A.* was a sufficient title to enable him to maintain the action, for that by it the entry of the defendant was tolled, and consequently illegal. (1)(c)

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Statute of
Limitations.

Adverse possession.

(1) Stokes v.
Berry, Salk.
421.

(c) In an action of trespass, adverse possession to be operative must be actual, continued, open, and visible, or it will not avail. *The Proprietors of Kennebeck Purch. v. Call*, 1 Mass. Rep. 483.

Possession may be proved by other evidence than an enclosure by a fence, and of its being appropriated to one to the exclusion of others. *Smith v. Isaacs*, 1 Root's Rep. 251. *S. P. Miller v. Dow*, *ibid.* 413.

A tenant entering under a lease, and holding over after the expiration of it, is not evidence of an adverse possession. *Brandt ex. d. Fitch et al. v. Marshall*, 1 Caines' Rep. 394.

A claim and colour of title sufficient to destroy all presumption that the defendant is in under the plaintiff, is adverse. *Jackson ex. d. Dunbar et al. v. Todd*, 2 Caines' Rep. 183.

Adverse possession, is a question exclusively for the jury. *Jackson ex. d. Judwin v. Jay*, 9 Johns. Rep. 102.

Where the legal title is in the plaintiff, the defendant will not be allowed to set up an equitable one in defence, against an action at law. *Jackson ex. d. Smith et al. v. Pierce*, 2 Johns. Rep. 221.

An entry adverse to the lawful possession, is not to be presumed, but must be clearly proved. *Jackson ex. d. Gansevoort et al. v. Parker*, 3 Johns. Cas. 124. *Wickham v. Cornklin*, 3 Johns. Rep. 170. *Jackson ex. d. Bonnell et al. v. Sharp*, 9 Do. 163.

A purchaser at Sheriff's sale, will not be presumed to hold adversely. *Jackson ex. d. Klein v. Graham*, 3 Caines' Rep. 188.

The possession of a defendant under an execution after a sale, is not adverse to the purchaser, for he is quasi his tenant at will. *Jackson ex. d. Kane et al. v. Sternbergh*, 1 Johns. Cas. 153. *S. C.* 1 Johns. Rep. 45. n. *S. C.* *Jackson ex. d. Klein v. Graham*, 3 Caines' Rep. 188.

So also if the tenant's son should come in under him. *ibid.*

To make out an adverse possession, the defendant must shew a substantial enclosure, an actual occupancy definite, positive, and notorious; it is not enough to make what is called a possession fence, merely by felling trees and lapping them one upon another round the land. *Jackson ex. d. Hardenberg et al. v. Schoonmaker*, 2 Johns. Rep. 239. *S. C.* 4 Johns. Rep. 390. Et vide *Doe ex. d. Clinton et al. v. Campbell*, 10 Do. 477. *Jackson ex. d. Gilliland et al. v. Woodruff et al.* 1 Cowen's Rep. 276.

To maintain a title on the ground of adverse possession, it must be adverse at its first commencement, and continue so uninterruptedly for twenty years. *Brandt ex. d. Walton v. Ogden*, 1 Johns. Rep. 156.

Where the party rests on a prior possession, it must be shewn clearly and unequivocally; and the payment of taxes and the execution of partition deeds, are not evidence of an actual possession, though they may shew a claim to title. *Jackson ex. d. Ludlow v. Myers*, 3 Johns. Rep. 383.

Where *A.* went into possession of land under an agreement made with *B.* for the purchase; and *C.* afterwards took possession under an agreement with *A.* for the purchase, the possession of *C.* was held not to be adverse to the title of *B.* *Jackson ex. d. Griswold v. Bard*, 4 Johns. Rep. 230.

Where a decree of a Court of Chancery has ordered partition, in consequence of the rights claimed, the title of the parties, in favour of whom the decree is made, accrues on such a decree, and possession previous to that time, cannot be urged as an adverse possession. *Jackson ex. d. Van Denberg et al. v. Bradt*, 2 Caines' Rep. 169.

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But to prevent the plaintiff from recovering, it must appear that the possession was *adverse*; the possession of a tenant during his term was before observed not to be so; neither is

An entry on land, and erecting improvements thereon, will amount to a claim of title, and constitute a disclaimer. *Smith ex. d. Teller v. Burtis*, 1 *Anth. & Cas.* 80.

In *North Carolina*, an actual adverse possession must be continued for twenty years, without entry or claim on the other side, before it can toll the plaintiff's right of entry. *Den ex. d. Park v. Cochran et al.* 1 *Hayw. Rep.* 178. *S. P. Den Slade v. Smith*, *ibid.* 348.

In *Connecticut*, fifteen years exclusive possession will bar the right to land may be given in evidence under the plea of not guilty. *Trowbridge v. Root*'s *Rep.* 60. *Lane v. Copley*, *ibid.* 68.

So it will, an equity of redemption, unless there be equitable circumstances to take it out of the rule. *Crittenden v. Brainard*, 2 *Root's Rep.* 485. *S. P. Sher Bird*, *ibid.* 509. *Skinner v. Smith*, 1 *Day's Rep.* 124. *Lockwood v. Lock* *ibid.* 295. *Bulkley v. Bulkley*, 2 *Day's Rep.* 363.

In *New York*, an adverse *possession* for twenty years and upwards, claim of title in lands, in right of a *possession*, which lands are a part of on which the *possession* is taken, is a bar to a recovery in ejectment. *Ja ex. d. Putnam v. Bowen*, 1 *Caines' Rep.* 358. Et vide *Jackson ex. d. Zimmerman v. Zimmerman et al.* 2 *Do.* 146.

A possession of forty years in conformity to an acknowledged, though erroneous line, is a good bar to a recovery in ejectment. *Jackson ex. d. Nellis v. D. 2 Caines, Rep.* 198.

After twenty years in *Massachusetts*. *Burrell v. Burrell*, 11 *Mass. Rep.* 4. Where an agreement relative to land has existed for more than a hundred and uninterrupted possession under it by one of the parties, his heirs and the opposite party is concluded from disputing the title, and the Court will not to technical objections to the deed for want of apt words, proper parties, or *Eman v. Turnbull et al.* 2 *Johns. Rep.* 313.

After a possession under a partition for a lapse of forty years, the party barred from contesting the correctness of it. *Jackson ex. d. Schuyler et al. 3 Johns. Rep.* 8.

Thirty years possession under an irregular location, will give a good title. *son ex. d. Wright v. Dieffendorf et al. ibid.* 269.

So an outstanding title, in certain Indians of the *Mohawk* tribe, was held extinguished, as the title had never been claimed or asserted, and the tribe had become extinct. *Jackson ex. d. Klock et al. v. Hudson*, *ibid.* 375.

After a lapse of forty-one years, a boundary according to which the party occupied the land, will not be disturbed. *Jackson ex. d. McDonald v. McDonald Johns. Rep.* 377. Et vide *Jackson ex. d. Newcomb v. Smith et al.* 9 *Do.* 10.

So where parties claiming under different patents, had nineteen years before trial, caused a new boundary line to be run between them, it was held, that that lapse of time, and their repeated acquiescence, it could not be disturbed. *son ex. d. Cortlandt et al. v. Van Cortlaer*, 11 *Do.* 123. *Jackson ex. d. Dyaling*, 2 *Caines' Rep.* 198. *Stuyvesant v. Tompkins et al.* 9 *Johns. R.* Et vide *Jackson ex. d. Weidman v. Hubble*, 1 *Cowen's Rep.* 613.

An outstanding title in a stranger, cannot be set up where there has been adverse possession for twenty years. *Jackson ex. d. Duncan et al. v. H. Johns. Rep.* 202.

A mortgage before foreclosure or entry, is not a legal title, which a stranger

possession of a joint tenant, parsoner, or tenant in common, Ch. IX. s. 1.
without proof of an *actual ouster*. Actual ouster.

set up. *Collins v. Torrey*, 7 *Johns. Rep.* 278. *Jackson ex. d. Martin et al. v. Pratt*, 10 *Do.* 381.

Where an adverse possession begins to run in the life-time of the ancestor, and the land descends to an infant heir, the latter is not protected by his disability. *Jackson ex. d. Colden et al. v. Moore*, 13 *Do.* 513.

A person who enters without claim or colour of title, is deemed to be in possession, in subservience to the legal owner, and no length of time, unaccompanied with any change in the character of the possession, will render it adverse. *Jackson ex. d. Belden v. Thomas*, 16 *Johns. Rep.* 293.

A person in possession of land, claiming title, may purchase in an outstanding title, to protect that possession. *Jackson ex. d. Preston et al. v. Smith*, 13 *Do.* 406.

In *New Jersey*, twenty years adverse possession is a bar to an ejectment. *Den ex. d. Clark v. Lane*, *Penning. Rep.* 417.

So in *Kentucky*. *Rice's heirs v. Lowan*, 2 *Bibb's Rep.* 149.

The entry of the owner of land, is only barred by an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years. It is not necessary to entitle him to recover in ejectment, that he should prove, that he or those under whom he claims, have been in possession within twenty-one years before suit brought. *Hawk v. Senseman*, 6 *Serg. & R. Rep.* 21.

On a joint demise by several, the infancy or coverture of more than one of the plaintiff's lessors, does not prevent the Statute from running. *Simpson et al. v. Shannon's heirs*, 3 *Mass. Rep.* 462.

By the Act of Limitations 26th March, 1785, (2 *Sm. L.* 299,) twenty-one years possession is sufficient. Et vide *White et al. v. Kyle's les.* 1 *Serg. & R. Rep.* 515.

In *Pennsylvania*, sixty years possession will furnish a bar to the title of land. *Morris' les. v. Vanderen*, 1 *Dall. Rep.* 67.

In *Pennsylvania*, it is not necessary to plead the Statute of Limitations; the benefit of that Act is secured to the defendant by his plea of *not guilty*. *Gallagher v. McNutt*, 3 *Serg. & R. Rep.* 409.

By twenty-one years possession of land, a right of possession is acquired, which is not only sufficient to support a defence, but is a positive title under which one may recover as plaintiff in ejectment. *Peiderick v. Searle*, 5 *Serg. & R. Rep.* 236.

In *Maryland*, the possession of the part of a tract of land is possession of the whole, and the law will adjudge the possession to be in him who has the right, unless the adverse possession were by actual inclosure or exclusive possession when twenty years possession will be a bar. *Smith's les. v. Middleton et al.* 1 *Har. & M. Hen. Rep.* 521.

So, an ancient possession of a tract of land, conveyed by a wrong name, cures a variance between the grant and the conveyance. *Joce's les. v. Harris*, *ibid.* 196. Vide *Clayland's les. v. Pearce*, *ibid.* 29. *Lee's les. v. Bladen et al.* *ibid.* 30. *Miller's les. v. Hynson*, *ibid.* 84. *Young v. Hawkins*, *ibid.* 148.

In *Virginia*, sixty years uninterrupted possession will give a good title to land and be a bar as well to a writ of right, as to an ejectment. *Birch v. Alexander*, 1 *Wash. Rep.* 45.

Long possession will render valid a defective conveyance. *Lee v. Tapscott*, 2 *Wash. Rep.* 351.

The Act of Limitations will run in equity, as well as at law, in favour of an adverse possession. *Harrison v. Harrison*, 1 *Call's Rep.* 419. Vide *Ross v. Norwell*, 1 *Wash. Rep.* 19.

In *North Carolina*, possession with colour of title for seven years, will bar an adverse possession. *Borretts v. Turner*, *Tayl. Rep.* 112. *S. C.* 2 *Hayw. Rep.* 113.

Part II.
Actual ouster.

(1) 1 Lord
Raym. 312.

(2) Vide
Reading v.
Rawsterne,
2 Lord Raym.
820. 5 Burr.
2604.

What does amount to such proof does not seem to be very accurately determined. (d) Lord Holt is reported to have said that the rule of the possession of one tenant in common being the possession of the other, did not hold place against the Statute of Limitations; and that if one of them only takes the profits, it is an *ousting* of the other; (1) but in subsequent cases it has been said, that bare perception of the whole profits does not amount to this; (2) and, therefore, where one tenant in common had been in receipt of the whole rents for twenty-six years, yet as there was no evidence of his having actually *claimed* the

S. P. Stanly v. Turner, Rep. in Co. of Conf. 533. Grant v. Winborne, 3 Hays. Rep. 56. — v. Ashe, ibid. 103. Anon. ibid. 134. Sed vide Bloss v. — ibid. 223, contra.

Possession of *part* of land, is possession of the *whole*. *Borretts v. Turner, ibid. 113. Larkins v. Miller, ibid. 345.*

From an uninterrupted possession for a great length of time, a jury, under certain circumstances, may infer that its origin was lawful. *Den ex. d. Hanks v. Tucker, Tayl. Rep. 157. S. C. 2 Hays. Rep. 147. Vide Wells v. Newbold, ibid. 166.*

Whether if an action be instituted under the Statute (of *New York*) of the 20th March, 1797, within the five years thereby limited, and it abate by the death of the defendant, who dies after the five years have expired, another action, though instituted directly after, can be maintained. *Jackson ex. d. Frost v. Horton, 3 Caines' Rep. 197.—AM. Ed.*

(d) One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied by any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. *McClurg v. Ross, 4 Wheat. Rep. 230.*

Joint tenants must join in ejectment, and one of three joint tenants cannot recover a third part of the premises of a stranger. *Milne v. Cummings, 4 Yeates' Rep. 571.*

The fact that one tenant in common is in possession of the estate, claiming to hold it by a deed covering the whole of it, is sufficient evidence of an ouster to support ejectment by a co-tenant. *Clark v. Vaughan, 3 Con. Rep. 191.*

If one tenant in common hinder the entry of the other, it will constitute an ouster. *Gordon v. Pearson, 1 Mass. Rep. 323.*

An exclusive possession by one tenant in common for forty years under a claim of right, will amount to an ouster. *Vandyck v. Van Beuren et al. 1 Caines' Rep. 44. Et vide Jackson ex. d. Denniston et al. v. Denniston, 4 Johns. Rep. 311.*

But a bare perception of the profits by *one* tenant in common without an adverse possession, will not bar the *other* tenant in common. *Morris's les. v. Vanderen, 1 Dall. Rep. 64.*

S. P. in Maryland. Johnson v. Howard, 1 Har. & M'Hen. Rep. 231.

In equity, as well as at law, it may be shewn from circumstances, that the possession of the defendant ought not to be considered as *adverse*. *Wallace et al. v. Duffield et ux. 2 Serg. & R. Rep. 521.*

In order to avoid the plea of the Statute of Limitations to an action by joint tenants, it is necessary to shew that all the tenants were under a disability to sue. *Biggison v. Minn, 4 Cranch's Rep. 415.*

One tenant in common may maintain ejectment against his co-tenant, though no actual ouster proved. *Shepard v. Ryers, 15 Johns. Rep. 501.—AM. Ed.*

whole estate, but, on the contrary, it appeared *that he was admitted* (the land being customary freehold) *to a moiety only*, it was holden to be no *ouster*, and that the Statute did not attach. (1) And the like decision took place where one tenant in common levied a fine of the whole premises, and there was no other evidence of adverse possession. (2) But though bare perception of the profits is not itself an *ouster*, yet if continued for a great length of time without any claim by the party out of possession, it may be evidence for the jury to presume one: as where partition was made of an estate of two women, who were tenants in common in tail, and one part was assigned to the husband of one during his life, and it was proved that after his death his wife remained in possession for thirty-six years, and there had been no acknowledgment of title, nor accounting for the rents; the Judge left it to the jury to *presume an actual ouster*, and they having found accordingly, the Court held that the Statute barred the action. (3) In that case Lord MANSFIELD said, the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title, and by paying him his share, he acknowledges him his co-tenant. Nor, indeed, is a *refusal to pay* of itself sufficient without *denying his title*. But if, upon demand by the co-tenant of his moiety, the other refuses to pay, and *denies his title, saying he claims the whole*, (4) and will not pay, and continues in possession, such possession is adverse, and *ouster enough*. Then adverted to the circumstances of the particular case, and observing that there was no evidence of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of title in them; his Lordship added, therefore I am clearly of opinion, that an undisturbed and quiet possession for such a length of time, is a sufficient ground for the jury to *presume an actual ouster*, and that they did right in so doing.

The disabilities mentioned in the Statute of *Hen. 7*, as to fines, and also in the Statute of *James 1*, are infancy, coverture, insanity, being imprisoned, or beyond the seas. Persons labouring under either of these disabilities, or their heirs, (5) may make their entries in the case of a fine, within five years, and in other cases within ten years, after the removal of the disability, notwithstanding twenty years may have elapsed; and, therefore, in either of these cases where the ordinary time is gone by, and the person suing, or his ancestor, was within this exception, the

Ch. 1X. s. 1.
Actual ouster.

(1) *Faireclaim dem. Empton v. Shackleton*, 5 Burr. 3604.
(2) *Black. 690*.

(3) *Peaseable dem. Hornblower v. Read*, ante,

(4) *Doe dem. Fisher and another v. Prosser*, Cowp. 217.

(5) *Vide Doe dem. Hillings v. Bird*, 11 East, 49. S. P.

Disability in plaintiff.

(5) *Vide Doe dem. George v. Jesson*, 6 East, 80.

Part II.
Disability in
plaintiff.

- lessor of the plaintiff should be prepared with proof of it.(e) Here it may be observed, that the disability should be shewn to have existed at the time when the fine was levied, or the title accrued, and to have continued till the within time of limitation, for when once the Statute has begun to operate, no subsequent disability will prevent its progress.(1) And if an estate descend upon two parceners, one of whom is under coverture, and the other a *feme sole*, though the time given by the Statute will extend to the moiety of the *feme covert*, the other must sue for her moiety within twenty years after her title accrues.(2)
- (1) *Doe dem. Durour v. Jones*, 4 T. Rep. 300.
- (2) *Roe dem. Langdon v. Rowston*, 2 Taunt. 441.
- (3) *Vide Co. Lit. 15. 3 Black. Com. 175.*
- (4) *Ford v. Grey*, Salk. 285, 6. Mod. 44, S. C.
- It should seem that previous to the Statute 4 Ann. c. 16, the party claiming title to lands in cases where the right of entry was not barred, might have avoided the operation of the Statute of *James* altogether, by making continual entries on the land; for as actual entry gave complete possession,(3) so every entry gave a new date from which the operation of the Statute commenced. In this case, however, it was necessary to prove an *actual entry*;(4) and for this there seems to be good reason, for if the formal confession of entry had been sufficient, the necessary consequence would have been, that in no case whatever would the Statute have had operation. Therefore, even if one ejectment were brought, and the plaintiff failed, the confession

(e) A deed will never be presumed from length of time to have been executed, where the parties have been under any legal disabilities. *Eaton v. Sandford*, 2 Day's Rep. 527.

The possession of the tenant for life, and those under him, though they claim a greater estate than he hath, will not defeat the right of remainder-man until after the death of the particular tenant. *Chandler v. Philips*, 1 Root's Rep. 546.

Neither a descent east, nor the Statute of Limitations will bar or affect a remainder-man or reversioner during the continuance of the particular estate; nor will the acts or laches of the tenant affect the party entitled in remainder. *Jackson ex. d. Hardenberg et al. v. Schoonmaker*, 4 Johns. Rep. 390.

Where the ancestor died in possession, and his son and heir succeeded, and continued in undisturbed possession for eighteen years, it was held, that a purchase of the title by the ancestor might be presumed. *Jackson ex. d. Mc Donald v. Mc Call*, 10 Johns. Rep. 377. *Vide Jackson ex. d. Myers v. Elpoveth*, 20 Do. 180.

The jury may presume a grant regularly issued where there had been a certificate of survey returned, and sundry conveyances, and possession by persons claiming under them. *Hall's les. v. Gaugh*, 1 Har. & Johns. Rep. 119.

So the Statute of Limitations begins to run within seven years after the right to defeat the title first descends. *Wells v. Newbold*, Tayl. Rep. 197.

An infant who has been disseised, is bound to bring his action within ten years after coming of age. *Jackson ex. d. Rensselaer et al. v. Whitlock*, 1 Johns. Cas. 213.

In *Maryland* it has been decided, that the Lord Proprietary had not the rights of the King of *Great Britain*, and that he might be barred by the Statute of Limitations, and adverse possession of lands, which he claimed by escheat. *Russell's les. v. Baker*, 1 Har. & Johns. Rep. 71.—AM. ED.

in that action would not have helped him in another brought after the expiration of the twenty years.(1) This mode of evading the Statute of *James* was remedied by the Statute of 4 Ann. c. 16, s. 16, whereby it is enacted, That no claim or entry to be made of or upon any lands, &c. should be of any force or effect to avoid any fine to be levied with proclamations, or should be a sufficient claim or entry within the Statute of *James*, unless upon such claim or entry an action should be commenced within one year next after the making such entry or claim, and prosecuted with effect. • Mr. *Douglas*, advertent to what was said in the law of *Nisi Prius*, makes a question, whether it is not necessary to make an actual entry to prevent the operation of the Statute of Limitations.(2) To which it may be answered, that it certainly is, if an action is to be brought *after* the expiration of twenty years from the time of actual possession; and in cases where the Statute of Limitations has nearly run, it may be prudent to adopt that measure, the effect of which will sometimes be to give the lessor of the plaintiff an additional year within which to bring a second ejectment in case of failure in the first; for if it be proved that a person having title, just at the conclusion of twenty years adverse possession, made an actual entry on the land, and that he brought his ejectment within a year afterwards, it seems that the Statute will not bar him;(3) whereas if, without making any entry, he had brought his ejectment and failed, he would have been without remedy in this form of action; for the formal confession of entry in the first ejectment would not, as we have before seen, have been a sufficient entry to enable him to bring another after the expiration of the twenty years.

It seems to have been formerly doubted whether when an ejectment was brought by one tenant in common against another, it was not necessary on the part of the lessor of the plaintiff to prove that he was actually ousted by his co-tenant;(4) but it is now clearly settled, that such evidence is not necessary, but is supplied by the confession in the rule.(5) If indeed the party in possession has never disputed the title of his co-tenant in common, he will not be obliged to make this confession;(6) but, as was observed by Lord MANSFIELD, in *Wigfall v. Brydon*, it is scarcely possible to suppose that a tenant in common should bring an ejectment, where there is not an actual ouster, viz. a denial of his title. Still, as there may be cases in which a tenant in common may be admitted to defend without confessing ouster,

Ch. IX. s. 1.
Defendant's
possession.

(1) Vide 12
Mod. 573,
and Bul. N.
P. 102, where
that book is
cited as Cas.
K. B.

(2) Dougl.
485, n. (1.)

(3) Vide 1
Williams'
Saund. 319, c.

(4) Vide 7
Mod. 39.

(5) *Oatesdem*
Wigfall v.
Brydon,
3 Barr. 1895.

(6) Doe dem.
Gigney v.
Roe, 2 Taunt
397.

Part II. it is incumbent on the plaintiff to produce the consent rule to
Actual ouster. shew that he has done so.(1)(f)

(1) Doe dem.
White v. Caff,
1 Campb. 173. Great inconvenience has frequently arisen by reason of the plaintiff being called on in all cases to prove that the defendant was in possession of the lands for which the ejectment was brought; to obviate which, general rules have lately been made by all the Courts at *Westminster*, making it incumbent on the defendant, in all cases, to specify the premises for which he defends, and to admit that he was in possession of them at the time of the service of the declaration in ejectment.

(f) If a defendant in ejectment claims title as tenant in common, he ought to enter into the common rule *especially*, for if he enters into the *usual* consent rule, he cannot object that no *actual ouster* was proved at the trial. *Jackson ex. d. Denton et al. v. Dennistoun*, 4 Johns. Rep. 311.

In *Connecticut*, tenants in common may join in an action for their common estate or each may sue separately for his part. *Hillhouse v. Mix*, 1 Root's Rep. 96.

In *Vermont*, tenants in common may maintain a *joint* action of ejectment. *Beck v. Rogers*, 4 Cranch's Rep. 165.

So in *New York*, tenants in common may make either a joint or separate demise in ejectment. *Jackson ex. d. Van Denberg v. Brady*, 2 Caines' Rep. 168.—*Am. Ep.*

SECTION II.

Of the defendant's evidence in general.

Sect. 2.
Defendant's
evidence.

I HAVE confined my observations concerning the evidence on the part of the plaintiff to that *formal* proof which every plaintiff in ejectment may be called upon to give.(g) I have, how-

(g) A rightful and lawful possession will be sufficient to recover in ejectment against the wrong doer. *Law v. Wilson*, 2 Root's Rep. 102.

So where the defendant had been three years in peaceable possession, and the plaintiff enters without any colour of right, the plaintiff's possession will be sufficient to recover in ejectment against the defendant who is considered a trespasser. *Jackson ex. d. Murray et al. v. Hazen*, 2 Johns. Rep. 22.

A person, who has been in possession of land for eight or ten years, under colour of title, is to recover against a mere intruder or trespasser. *Jackson ex. d. Duncan et al. v. Harder*, 4 Johns. Rep. 202.

If there be, out of the plaintiff, a better title in a third person, than the plaintiff's, the defendant shall keep possession against the plaintiff, until the better title shall appear. *Gilliland's les. v. Hanna*, Addis. Rep. 254.

ever, observed, in the outset, that he must prove a legal title in himself. It follows, that if the defendant prove a title in any other person, he gives an answer to the plaintiff's claim; and though it was at one time held, that if the plaintiff were really entitled to the possession of the premises, a bare legal title should not preclude his recovery; yet it is now clearly settled, that if the legal estate be shewn to be in any other person he cannot recover.(h)

Ch. IX. s. 2.
Defendant's
evidence.

The plaintiff in ejectment must prove the bounds and location of the lands, to which he has made title, though no defence be made for any lands lying within the bounds of his pretensions. *Dockery's les. v. Maynard*, 1 H. & M. Hen. Rep. 209.

So possession is a good title against another who claims under an escheat grant, there being no proof of death of the tenant. *Hutchins's les. v. Erickson*, *ibid.* 339.

If the verdict do not find title or possession in the grantor he can convey neither, and his grantee cannot maintain ejectment against the tenant in possession. *Tabb v. Baird*, 3 Call's Rep. 475.

In law, the plaintiff must recover on the strength of his own title, without regard to the weakness of the defendant's title; in equity, the complainant must shew that he has a good and superior equitable right to the thing demanded, before he can wrest the legal title out of the defendant, whatever were the means by which it was acquired. *Patterson v. Bradford*, *Hardin's Rep.* 101.

But in an action of ejectment, when the defendant pleads the general issue, and claims no title in himself, he shall not be permitted to give in evidence a copy of a deed from the plaintiff's grantor to a stranger to prove that the plaintiff has no title. *Pelphs v. Yeomans*, 2 Day's Rep. 227.

If the defendant acquire title to the premises in question any time during the suit, the plaintiff cannot recover. *Munsell v. Sandford*, 1 Root's Rep. 257.

How far this rule in actions concerning realties will apply to personalities. *Miller et al. v. Miller et al.* 2 Dall. Rep. 1.

Possession in the lessor, without claiming title, will not maintain the action. *Truesdale v. Jeffries*, 1 Caines' Rep. 190, n.

It is not necessary that the plaintiff should, on every occasion, shew a possession of twenty years, or a paper title; but a possession for a less period will form a presumption of title sufficient to put the tenant on his defence. *Smith ex. d. Teller v. Lorillard*, 10 Johns. 338.

The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of the defendant. *Les. of Welker v. Coulter*, *Addis. Rep.* 390. *Lane et al. v. Reynard et al.* 2 Serg. & R. Rep. 65. *Covert et al. v. Irwin et al.* 3 Do. 283.

If plaintiff have a regular paper title, it is sufficient if he shew a right of entry. *Les. of Milligan v. Dickson*, 1 Peters' Rep. 435, n.

A marked possession is a good title to recover against one who put the plaintiff out of possession, and can shew no better title. *Aliter*, where the defendant can shew a better title. *Woods et al. v. Lane et al.* 2 Serg. & R. Rep. 53.—AM. ED.

(h) In New York, where the legal title is in the plaintiff in an action of ejectment, the defendant will not be allowed to set up an equitable title in defence against the action at law. *Jackson ex. d. Smith et al. v. Pierce*, 2 Johns. Rep. 221. *S. P. Jackson ex. d. Potter et al. v. Sisson*, 2 Johns. Cas. 321. *Jackson ex. d. Kemball v. Van Slyck*, 8 Johns. Rep. 380. *Jackson ex. d. Whitbeck et al. v. Deyo*, 3 Do. 422. So an equitable title which is doubtful, cannot prevail in an action of ejectment against the legal title. *Jackson ex. d. Potter et al. v. Sisson*, 2 Johns. Cas. 321.

Part. II.
Defendant's
evidence.

(1) Vide Do-
dem. Bris-
towel P. gge,
1 T. Rep.
753.

During the time that the former doctrine prevailed, the Court would not permit a party who did not mean to disturb outstanding incumbrances to be turned round by them; and, therefore, if a term were created for particular purposes, and the person entitled to the possession, subject to the incumbrances, for the security of which such term was created, brought an ejectment; it was not permitted to a third person, claiming under the same title as the plaintiff, to set up this term as an answer to the action. (1) On the same principle, if a mortgagee whose mortgage bore date subsequent to a lease, gave notice to the tenant that he did not mean to disturb his possession, but only sought the recovery of the rents and profits, the tenant was not suffered to set up his prior title by lease; or in case of a holding from year to year, to object to the want of notice to quit, and thereby defeat the ejectment of the mortgagee. The contrary, however, is now established by a variety of cases; and therefore, if the existence of such term he proved on the part of the defendant, the plaintiff cannot recover, unless there be evidence on his part for the jury to presume a surrender of the term.

This can never be done where the purposes for which the term was created are not completely answered; so that where a term was created for the purpose of securing an annuity, it

So in *New Jersey*, legal titles will not bend to equitable claims in the trial of an action of ejectment. *Denn ex. d. Snedeker v. Allen, Penning. Rep. 35.*

In *Pennsylvania*, a legal right of entry is sufficient to maintain an ejectment. *Sims' les. v. Irvine, 3 Dall. Rep. 425.*

In *North Carolina*, in Courts of Law, the legal title will be looked to. *Bloss v. Haddock, Rep. in Co. of Conf. 75. Johnston v. Hunly, Tayl. Rep. 305.*

In *Virginia*, a decree of a County Court directing the defendant, a resident within its limits, to execute a conveyance for lands lying in another county, being enforced only upon the person of such defendant, and not vesting any legal title in the complainant, cannot be received as evidence in any action of ejectment. *Aldridge et al. v. Giles et al. 3 Hen. & Munf. Rep. 136.*

An outstanding title must be a present, operative, and subsisting title, otherwise the presumption will be that such title has been extinguished. *Jackson ex. d. Klock et al. v. Hudson, 3 Johns. Rep. 375. Jackson ex. d. Dunbar et al. v. Todd, 6 Do. 257.*

A mere intruder will not be allowed to protect himself in the possession by setting up an outstanding title in a stranger. *Jackson ex. d. Duncan et al. v. Harder, 4 Johns. Rep. 204.*

An outstanding title in a stranger cannot be set up where there has been an adverse possession. *ibid.*

A mortgage, before foreclosure or entry, is not a legal title, which a stranger can set up. *Collins v. Torrey, 7 Johns. Rep. 278. Jackson ex. d. Martin et al. v. Pratt, 10 Do. 381.*

A Court of Law will not permit a stranger and wrong-doer to defend himself by setting up a mere trust estate standing out in the name of the plaintiff's lessor's trustee. *Denn ex. d. Snedeker v. Allen, Penning. Rep. 35.—AM. ED.*

was holden that during the life of the annuitant, the heir at law could not recover on his own demise, though he claimed subject to the charge ;(1) and where an old term has been from time to time recognised as existing till within a few years before the time of trial, and an ejectment is brought by the trustees named in it, with the concurrence of the owner of the inheritance, who is interested in upholding it, a jury will not be directed to presume a surrender..(2) But where it is in proof, on the part of the plaintiff, that the trusts, on which the term was created, have been completely fulfilled, so that the trustees *ought* to have conveyed, the jury will be directed to presume that in point of fact *they have done so*, though there is no direct evidence of the fact.(3) Thus, in one case, where a man by will, dated in *Dec. 1777*, devised certain premises to three persons as trustees, for his son's maintenance till he came to twenty-one years of age, and then to convey to him; the son came of age in 1788, and in 1789 made a lease, and that lease being relied on by the lessor of the plaintiff in an ejectment brought in the year 1792;(4) and by the same party, when defendant, in another ejectment brought against him in the year 1796;(5) the Court of King's Bench, in both instances, held that the jury might presume a conveyance by the trustees, for their trust having expired, it was their duty to do so.* But if the jury do not find such surrender as a fact, in a special verdict or case, the Court in this, as well as all other instances of facts resulting from evidence, is precluded from drawing the conclusion,(6)

In cases where a term is in all events to take place, the *onus* lies on the lessor of the plaintiff to prove that the purposes for

Ch. IX. s. 2.
Outstanding
terms.

(1) Doe dem.
Howdon v.
Steph., 2 T.
Rep. 684.

(2) Doe dem.
Graham v.
Scott, 11 East,
478.

(3) Doe dem.
Howell v.
Lloyd, App.

(4) England
dem. St. bourn
v. Slade, 4 T.
Rep. 683.

(5) Doe dem.
Howerman v.
Sybourne,
7 T. Rep. 2.

(6) Vide
Goodtitle
dem. Jones
v. Jones, 7 T.
Rep. 47.

* In 1717, a term of 1000 years was created, which in 1735 was assigned to secure an annuity to A. and afterwards to attend the inheritance. A. died in 1741, and the estate remained undisturbed, in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for. In an ejectment by the heir at law of the testatrix, the estates devised being spent, the Court held that a surrender might be presumed. *Doe dem. Birdett v. Wright*, 2 Barn. & Ald. 710. In another case a term of years was created in 1762, and assigned over to a trustee to attend the inheritance in 1799. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 he conveyed his life interest to a purchaser, as a security for a debt, but no assignment of the term, or delivery of the deeds relating to it, took place on either occasion. In 1819, just before the trial, an actual assignment of the term was made by the administrator of the trustee in 1799, to a new trustee for the purchaser of 1816. Held, that under the circumstances, on an ejectment brought by a prior incumbrancer against the purchaser, the jury were warranted in presuming that the term had been surrendered previously to 1819. *Doe dem. Putland v. Bilder*, 2 B. & A. 782.

Part II.
Outstanding
terms.

(1) *Wilson v. Witherby*,
Bul. N. P.
110.

(2) *Lindsey v. Lindsey*,
Bul. N. P.
110.

(3) Vide 3
Barr 1416.
Bul. N. P.
110.

(4) *Roe dem. Reade v. Reade*, 8 T.
Rep. 122.

(5) 2 T. Rep
698.

which it was created have been satisfied ; but, where the conveyance is conditional only, as in the case of an old mortgage for years, the defendant must give further evidence than the mere proof of the mortgage deed. He should, in this case, also prove either a possession under it, or payment of interest by the mortgagor, subsequent to the day of redemption, and within twenty years ; for otherwise the presumption is, that the money was paid at the day, and, consequently, it is no subsisting title.(1)

But here it should be observed, that it is not every person who is in condition to avail himself of terms outstanding in a third person ; a tenant is never permitted to dispute the title of his landlord ; nor a mortgagor to shew that he himself had no title at the time of making the mortgage ;(2) and Lord MANSFIELD said, in the case of *Lade v. Holford*, that he never would suffer a plaintiff to be nonsuited by a term outstanding in his own trustee, but direct the jury to presume it surrendered.(3) But it is now held, that whether the ejectment be between the *cestui que trust* and his trustee, or between him and any third person, if the term be *unsatisfied*, the person, having only an equitable interest, cannot recover.(4)

The inconveniences attending the present practice of requiring a strict legal title were very ably pointed out by Mr. Justice BULLER,(5) and his argument would be unanswerable, did not a Court of Equity interfere on this subject ; and in cases where the circumstances under which the person beneficially interested stands, are such as to render it advisable that he should have the possession, extend its interference to prevent an outstanding term from being set up to defeat his recovery.

SECTION III.

Of the evidence in ejectment, by landlord against tenant.

Sect. 3.
Evidence in
ejectment.

(6) *England dem. Sybourn v. Slade*, 4 T.
Rep. 683.

THE action of ejectment, by a landlord against his tenant, can be brought only in two instances ; one, where the demise is at end by effluxion of time, or voluntary act of the parties ; the other where the tenant has committed a forfeiture.

In neither case will the lessor of the plaintiff be called on to give any evidence of his title anterior to the lease,(6) for neither the tenant, nor any other person who came into possession under

him,(1) will be permitted to dispute the title of the person from whom the former took the premises ; he may, indeed, shew that the title has since expired, but he cannot be permitted to prove that he originally had none.(2)*(i)

Ch. IX. s. 3.
Evidence in
ejectment.

(1) Doe dem.
Knight v.
Smyth, 4 M.
& S. 34.

* It has long been established as a general principle, that a tenant shall not be permitted to dispute the title of his landlord, vide ante, 259 ; but in a case which occurred at *Nisi Prius* before Mr. Justice BAYLER, that learned Judge held, that where a person who had paid rent afterwards and before any ejectment was brought refused to pay more rent, insisting that the supposed landlord was not entitled, that such refusal enabled him, when defendant in ejectment, to give evidence of the title of another, and that in such case the payment of rent was only *prima facie* evidence of the title of the person to whom it was paid. Vide *Doe dem Bailiff, &c. of Clun v. Clarke and others, Appendix*.

(2) Doe dem.
Jackson v.
Ramsbottom,
5 M. & S. 56.

In a case which afterwards came before the Court of Common Pleas, (*Rogers v. Pitcher*, 6 Taunt. 202,) the generality of this doctrine was explained, and in some measure limited. It was holden that in that case (which was an action of replevin,) that the payment of rent was only *prima facie* evidence of ownership, and did not preclude the person paying from shewing a title in a third person ; and the Chief Justice GRAM said, "the payment of rent raises a presumption that the party receiving it had a good title to it, but it is a presumption only, and capable of being rebutted. The same doctrine which I now lay down was held by BAYLER J. in an ejectment at *Shrewsbury* for cottages, for which rent had been paid to the corporation ; the payment of rent was certainly *prima facie* evidence of their title. My brother BAYLER held, that the defendant having disclaimed to hold under the corporation, that was equivalent to a notice to quit, and left them at liberty to shew who was the real proprietor of the soil. This doctrine must be taken with reference to the subject matter, and to the case in which it is laid down. It was not a case in which the tenants had been *let into possession* by the corporation. If it had been, I should have thought that the defendants never could have disputed the title of the corporation while they continued in possession ; but these were cottages built on the waste, and the corporation claimed to be lords of the manor, and the tenants, who at first acquiesced, being afterwards advised of other landlords, disclaimed to hold of the first."

Landlord and tenant.

(i) In an action of ejectment by the lessor against the lessee, the lessee is estopped to say the plaintiff has no title. *Holmes v. Kennedy*, 1 Root's Rep. 77.

So where a tenant has once recognised the lessor as his landlord, he cannot be permitted to dispute his title. *Jackson ex. d. Low et al. v. Reynolds*, 1 Caines' Rep. 444. *Jackson ex. d. Blecher v. Whitford*, 2 Do. 215. *Jackson ex. d. Van Allen et al. v. Vosburgh*, 7 Johns. Rep. 186. *Jackson ex. d. Anderson et al. v. McLeod*, 12 Do. 182.

A person purchasing land under an execution, is substituted in the place of the defendant, and in ejectment by the landlord, cannot set up a title in a third person. *Jackson ex. d. Klein v. Graham*, 3 Caines' Rep. 188.

Where the landlord unites with the tenant in defending an ejectment, it is sufficient to prove the tenant to have been in possession at the commencement of the suit, and his possession is deemed that of the landlord. *Jackson ex. d. Wood v. Harrow*, 11 Johns. Rep. 434.

An acknowledgment, by a defendant in an ejectment, that he went into possession under one of the lessors of the plaintiff, was held sufficient evidence to enable the plaintiff to recover. *Jackson ex. d. Sagoharis et al. v. Dobbin*, 3 Johns. Rep. 223.

Part. II.
On determination of demise.

(1) Vide ante, 93, note *

The lessor of the plaintiff, therefore, in the first case has only to prove the demise, and that the term has been determined. This may be done either by proving the counterpart of the lease by the subscribing witness, in cases of a demise by deed, (which seems to be sufficient without any notice to produce the original ;)(1) or, where the demise was by parol for a certain time, by some person present at the making of it. In cases of tenancy from year to year, which almost every demise is now deemed to be, unless some definite time be fixed on, the lessor of the plaintiff must also prove that the demise has been determined by a regular notice to quit. The notice which is generally required is

Where a person has entered into the possession of land under another and acknowledged his title, he cannot set up in defence to an action of ejectment against him an outstanding title in a third person. *Jackson ex. d. Smith et al. v. Stewart*, 6 Johns. Rep. 34.

So, in *Pennsylvania. Les. of Dimond v. Enoch*, Addis. Rep. 356.

So a tenant cannot resist his landlord's title by virtue of an adverse title acquired during his lease. *Galloway's les. v. Ogle*, 2 Binn. Rep. 468.

So a claim or title which cannot be set up by a person while in possession, cannot be set up by another who comes into possession under him. *Jackson ex. d. Duncan v. Harder*, 4 Johns. Rep. 202.

So where the defendant sold his right in the premises to the plaintiff, and agreed to deliver up the premises, and afterwards refused, the defendant was held incompetent to prove a title in a third person. *Wood v. Hyatt*, *ibid.* 313.

So also as to a purchaser at a Sheriff's sale. *Jackson ex. d. Kane v. Sternberg*, 1 Johns. Cas. 153.

Where the defendant acknowledged that he got his title from one who claimed to hold as a devisee under the will of the grantor to the husband of demandant, whose interest was sold by the Sheriff, this was held to be a recognition of the title under which the husband of the demandant in dower claimed. *Embree v. Ellis*, 2 Johns. Rep. 119.

If the tenant have enjoyed the land, he cannot repel the landlord's claim for rent, by saying he had nothing in the land, &c. *Watson et al. v. Alexander*, 1 Wash. Rep. 440.

Aliter, if he be evicted. *Ross v. Gill et ux.* *ibid.* 114.

But in an action on the case on a Statute (of *Vermont*) to recover the mesne profits of land levied upon by execution, the defendant is not estopped from shewing that he had no title to or interest in the land. *Bowne v. Graham*, 2 Tyl. Rep. 412.

Where a tenant who had been many years in possession of land under the titles of the supposed proprietary, applied to him as the real owner to buy, and requested to be considered as his tenant; in an ejectment brought by the proprietary against the tenant, it was held that the tenant might shew that he had made the application under a mistake, and prove a title out of the proprietary, though he could not set up an adverse possession of twenty years. *Jackson ex. d. Vicley et al. v. Cuenden*, 2 Johns. Cas. 353.

Evidence of an agreement for a lease, between the lessor in ejectment, and the tenant, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid; and the tenant claimed to hold adversely. *Jackson ex. d. Southampton v. Cooley*, *ibid.* 223.—*Am. Ed.*

half a year, expiring at the same season of the year as that when the defendant entered ;(1) but where the custom of the country requires a longer or shorter time of notice, it has been said, that such custom will control the general rule.(2)(k)

Ch. IX. s. 3.
Notice to quit.

(1) Right
dem. Flower
v. Darby, 1
T. Rep. 159.

(2) Vide Roe
dem. Brown
v. Wilkinson,
Butt. Co. Lt.
and Roe dem.
Henderson
v. Charnock,
Peak. Cas. 5.

In cases of this description, it is often difficult to give direct evidence of the demise, and where that cannot be done, the subsequent payment of rent will be *prima facie* evidence of an

Notice to quit.

(k) Notice to quit, is only necessary where the relation of landlord and tenant subsists between the parties. *Jackson ex. d. Philips v. Aldrich*, 13 Johns. Rep. 106.

A tenant at will is not entitled to notice to quit. *Jackson ex. d. Van Denberg v. Bruck*, 2 Cuines' Rep. 169.

Sed vide *Jackson ex. d. Livingston et al. v. Wilsey et al.* 9 Johns. Rep. 267, in which the Court seem inclined to the opinion that he is entitled to notice.

Nor is a *bailiff* or *servant*. *Jackson ex. d. Fitzroy v. Sample*, 1 Johns. Cas. 231.

Nor is a tenant who claims to hold adversely. *Jackson ex. d. Dill v. Tyler*, 2 Johns. Rep. 444.

To entitle the defendant to notice there must be a privity either of contract or of estate, between the lessor and the defendant. *Jackson ex. d. Ferres v. Fuller*, 4 Johns. Rep. 215. *S. P. Jackson ex. d. Whitlock v. Deyo*, 3 Johns. Rep. 424.

A parol gift of land only creates a tenancy at will ; if the donee lease and the donor do not ratify his act, the mere permitting the lessee to build and enjoy under the term will not prevent the donor from legally devising the land, and his devisee may recover without notice. *Jackson ex. d. Van Allen v. Rogers*, 1 Johns. Cas. 33. 2 N. York Cas. in Er. 314.

A tenant at sufferance, is not entitled to notice to quit. *Jackson ex. d. Van Cortlandt v. Parkhurst*, 5 Johns. Rep. 123.

A tenant at will is considered as holding from year to year only for the purpose of a notice to quit ; but he has no right to such notice after he has determined the will by an act of voluntary waste. *Phillips v. Covert*, 7 Johns. Rep. 1.

But where a person entered on land with the permission of the owner as a mere occupant, and without any reservation of rent, and made improvements, after eighteen years possession he was to be considered as a tenant from year to year, and entitled to a notice to quit. *Jackson ex. d. Livingston v. Bryan*, 1 Johns. Rep. 322.

So where A. entered on the land of B. with his permission as a mere occupant without any rent reserved ; B sold to C. under whom A. continued in possession, and afterwards sold to D. who took possession and claimed to hold under the deed from A. ; this disclaimer of tenancy was held sufficient to dispense with a notice to quit. *Jackson ex. d. Lockeell v. Wheeler*, 6 Johns. Rep. 272.

Where the defendant went into possession of land, by the consent of the owner, and continued so fifteen years, improving the premises under an expectation to hold the land for life, he was entitled to a notice to quit, though no rent were reserved. *Den ex. d. Mackey v. Mackey, Penning. Rep.* 420.

The notice to quit (under the Act of Assembly in *Pennsylvania*) must be given three months before the end of the term. *Brown v. Vanhorn*, 1 Binn. Rep. 334, n.

Notice to quit given by a lessor to his lessee who has continued to pay him his annual rent, is sufficient though another person is in possession of the premises. *Jackson ex. d. Livingston v. Baker*, 10 Johns. Rep. 270.

Tenant at sufferance not entitled to notice to quit. *Jackson ex. d. Anderson et al. v. McLeod*, 13 Johns. Rep. 182.

(1) Doe dem.
Clarke v.
Grant, 12
East, 221.

(2) Roe dem.
Clarges v.
Foster, 13
East, 405.
Doe dem.
Leicester
v. Biggs,
2 Taunt. 109.
Doe dem.
Puddicombe
v. Harris,
cited 1 T.
Rep. 161.

antecedent demise from year to year;* but to enable the party to shew on whose behalf the rent was received, notice should be given to the defendant to produce his receipts. If one joint rent has been paid to an agent of several parties on their behalf, though such agent was appointed by the several parties at different times such payment will be evidence of their joint title.(1)

After this general evidence of a demise from year to year, the proof of a notice to quit having been served on the tenant himself, and no objection made by him at the time,(2) has been held to raise a presumption that the year expired at the time mentioned in it, and to make it incumbent on the tenant to shew the commencement of the tenancy, if, indeed, it did commence at another season;† and even where a notice was general, to

Where *A.*, a lessee, agreed to sell the lease to *B.* for a certain sum, and endorsed his name on the lease, and delivered it to *B.* who paid him the purchase money, and agreed to pay the rent in arrear, and to become due on the lease, it was held that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, and that therefore *B.* was entitled to a notice to quit. *Jackson ex. d. Stewart v. Kingsley*, 17 *Johas. Rep.* 158.—*AM. Ed.*

* This is in all cases *prima facie* evidence of a tenancy from year to year, and we have before had occasion to remark (*ante*, 257,) that after such evidence, the defendant could not turn the plaintiff round by general evidence of an agreement in writing which he had not given notice to produce, and of which he was not prepared to give regular evidence. It may be also here observed, that where a tenant had been let into possession of premises under a promise to execute an agreement and bring a surety, but had afterwards refused to do so, the Court held this conduct on his part to be a rescinding of the agreement, and to make him a trespasser, or at least a mere tenant at will, so that the landlord might eject him without a regular half-year's notice, or any evidence of the contents of the paper writing which he had rescinded. *Doe dem. Bingham v. Cartwright*, 3 *B. & A.* 326.

† Difficulties have frequently arisen where, by the custom of the country, the tenant enters upon different parts of the premises at different periods of the year. A case of this kind lately occurred; the tenant had agreed "to enter on the tillage land at Candlemas, and on the house and all the other premises at Lady-day following; and that, when he left the farm, he should quit the same according to the times of entry as aforesaid;" the rent was reserved half-yearly at Michaelmas and Lady-day. The landlord, half a year before Lady-day, but less than half a year before Candlemas, gave notice to quit *at the end of the year*; and the Court held this notice to be good; the taking being in substance from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candlemas for the purpose of ploughing. *Doe dem. Strickland v. Spence*, 6 *East*, 120. But in a subsequent case (*Doe dem. Lord Bradford v. Watkins*, 7 *East*, 551.) where a demise was made in January of a dwelling-house and other buildings, for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching-grounds, for thirty-five years, to commence, as to the meadow, from 25th of December last; as to the pasture, from 25th of March next; and as to the rest of the premises, from the 1st of May, reserving the first half-year's rent on the day of Pentecost, the other at Martinmas: it was held, that the substantial time of entry to which the notice

quit at the end of the current year, and the defendant was at the distance of near a year afterwards personally served with a declaration in ejectment, wherein the demise was laid six months after the service of the notice without objection on his part to the notice, Lord ELLENBOROUGH left it to the jury to consider whether that circumstance did not amount to an admission, on the part of the tenant, that the tenancy determined at the time mentioned in the declaration. But if the notice was left at his house, the lessor of the plaintiff will be called on to give some further evidence of the commencement of the term.(1) When it is uncertain whether the year expired at new or old Lady-day, a notice to quit "on the 25th of *March*, or the 8th of *April*," has been holden to be sufficiently certain; and, if delivered half a year before the first of those days, throws it on the tenant to shew that it expired at some other time.(2) So where the year expired at old Lady-day, and the notice was to quit at Lady-day, without saying old Lady-day, the notice was holden to be sufficient to maintain an ejectment after old Lady-day.(3) It is sufficient if this notice were left at the dwelling-house of the tenant with a servant there, though such dwelling house formed no part of the demised premises;(4) and if there be a joint demise to two persons, one of whom resides on the premises and the other elsewhere, a service on him who resides on the premises is sufficient for the jury to presume that it reached the other tenant;(5) and where the immediate tenant has underlet, the notice to quit by the landlord must be to the person to whom he demised, and not to the actual tenant in possession, between whom and the landlord there is no privity.(6)

Ch. IX. s. 3.
Notice to quit.

Doe dem.
Woombwell
v. Baker,
2 Campb.
559.

(1) Doe v.
Calvert,
2 Campb 388.

(2) Doe dem.
Mathewson
v. Wright-
man, 4 Esp.
Cas. 3.

(3) By Heath,
J. in Denn d.
Willan v.
Walker,
Glouc. Sum.
Ass. 1800, 1
who cited
Denn. d. Al-
stone v.
Waine, C. B.
East, 32 G. 3.

(4) Jones dem.
Griffiths v.
Marsh, 4 T.
R. 464.

(5) Doe dem.
Lord Brad-
ford v. Wal-
kins, 7 East,
557:

(6) Roe v.
Wiggs, 2 N.
Rep. 380.
Pleasant dem.
Hayton v.
Benson, 14
East, 234.

As to the person by whom the notice may be given, it has been held that one tenant in common may give notice for his

ought to refer was the 1st of *May*, when the house and manufacturing buildings were entered upon; and in another case (*Doe dem. Heapy v. Howard*, 11 East, 498,) the demise being of a messuage and several closes of land thereunto belonging, containing thirteen acres, for eleven years, to hold the lands from the 2d of *February*, and the house and other premises from the 1st of *May*, rent payable half-yearly, at Michaelmas and Lady-day, and a notice was given to quit on the 1st of *May*, or whenever else his tenancy should expire, it was objected at the trial that the notice, not having been given six months before the 2d of *February*, when the land, which it was contended was the principal subject of the demise, was entered upon, was not sufficient; Mr. Baron WOOD, who tried the cause, nonsuited the plaintiff: and, on a motion for a new trial, the Court refused a rule, saying, it must in all cases depend on the relative value and importance of the house and land together, which was the principal and which the accessory, and that if the plaintiff disputed the fact assumed by the Judge, that the land was the principal, he should have desired him to leave it to the jury.

(1) *Cottings v. Derby*, 2 Blac. 1075.

(2) *Right dem. Fisher v. Cuthell*, 5 East, 491.

(3) *Goodtitle dem. King v. Woodward*, 3 B. & A. 689.

Doe dem. Sykes, bart. v. Durnford, 2 M. & S. 62.

Disclaimer.

(4) *Bul. N. P.* 96.

(5) *Doe dem. Williams v. Pasquali, Peake's Cas.* 196.

(6) *Goodright dem. Charter v. Cordwain*, 6 T. Rep. 219.

(7) *Zouch dem. Ward v. Willingale*, 1 H. Blac. 311.

(8) *Crompton v. Minshull*, East, 82 Geo. 3. *Runnington's Eject.* 80.

moiety,(1) but if there are two or more joint-tenants all must join. A notice given by one on behalf of himself and others, without their authority, is so absolutely void as not to be made good by the subsequent assent of the others.(2)* But if an agent, who has been appointed by some of the joint-tenants, give the notice, and the others afterwards recognise his authority, and act upon it, that is sufficient; and where a receiver was appointed by the Court of Chancery, and he let the land, and afterwards gave notice to quit, his notice was held sufficient without any such evidence of recognition.(3)

If there is a subscribing witness to the notice, he must be called or his absence accounted for, although the tenant made no objection at the time of service.

In cases where the tenant has absolutely denied the title of his landlord, as if he has attorned to another person, no notice at all is necessary;(4) but when on the death of the original landlord, leaving a will, there were disputes between his heir and devisee as to its validity, and the tenant being applied to by the latter, admitted the title of the original lessor, but refused to pay the devisee, merely on account of the dispute between him and the heir, it was determined by Lord Kenyon, at *Nisi Prius*, that this was not such a denial of title as to enable him to maintain an ejectment without any previous notice.(5)

The defendant may sometimes avoid the effect of this notice to quit, by shewing that the lessor of the plaintiff has waved it by some subsequent act; as if he has received,(6) or distrained,(7) or brought covenant,(8) for rent accrued subsequent to the time of quitting mentioned in the notice, or done other acts whereby he has acknowledged the defendant to be his tenant *subsequent to that time*;(1) but the payment of rent *due before*,

* The principle laid down in the case cited seems to go to this extent, and was so considered in the subsequent case of *King v. Woodward*, but it should be observed that the case of *Fisher v. Cuthell*, was not a mere notice to quit, but a notice to determine a tenancy by the landlord or tenant, their heirs, executors, &c. giving six months notice under his, her, or their respective hand or hands; and the landlord having devised to three persons, and two only having given the notice, the Court appear to have laid particular stress on these words.

(1) A notice to quit, at the end of a certain year, is not waved by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an *improving lease*. *Boggs adm. v. Black*, 1 Binn. Rep. 333.

A notice to quit must be given in the case of a lease for a year, and from year to year, as long as both parties please, and so where the lease is to one to hold during the pleasure of the lessor. *Bedford v. M'Elherron*, 2 Serg. & R. Rep. 49.

though made *after* the expiration of the time of quitting, does not avoid the notice; (1) nor will a landlord who has given one notice, and brought an ejectment on it, lose the benefit of it by giving another notice to quit at a subsequent day, under an idea that he should not be able to prove the first, (2)

It has hitherto been the practice for the lessor of the plaintiff to be nonsuited if the defendant does not appear, and afterwards to take a verdict against the casual ejector, in all cases, whether the ejectment were defended or not, and to bring an action for the mesne profits: but an Act of Parliament has lately passed which gives further remedies to landlords in ejectment, and enacts, "That whenever it shall appear on the trial of any ejectment by a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry and ouster; but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry and ouster; and the Judge, before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day, or expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits: provided always, that nothing therein contained shall be construed to bar such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of delivery of possession of the premises recovered in the ejectment."

In cases of *forfeiture*, by breach of the covenants in the lease,

On a forfeiture.

But where the lease is to expire at a particular time, the lessor may maintain ejectment, without notice to quit. *ibid.*

If a lease be for a year, and the tenant is afterwards permitted to remain from year to year, a notice in the first month of a new year to quit is illegal. The tenant has a right to hold for that year. *Faknestock et al v. Faustenauer*, 5 Serg. & E. Rep. 174. Et vide *Logan v. Herron*, 3 Do. 459.—AM. ED.

Ch. IX. s. 3.
Mesne profits
moveable
under Stat.
Geo. 4.

(1) Vid. 1 H.
Blac 312.

(2) Doe dem.
Williams v.
Humphreys,
2 East, 237.

Geo. 4,
c. 87.

Part II.
On a forfei-
ture.

the lessor of the plaintiff must first prove the lease, and then the breach complained of. The declaration in ejectment not conveying any intelligence to the defendant of the cause of forfeiture, the defendant, in cases where there are many covenants, is often at a loss to know to which he is to apply his evidence; and, to prevent the inconvenience which this would occasion, the Court will sometimes oblige the plaintiff to give the particulars in writing of the breaches he means to give in evidence; and after that he will be precluded from giving evidence of any other. (1)

(1) Vide Doe
dem. Birch
v. Philips,
6 T. Rep.
597.

The most usual cause of re-entry is that for non-payment of rent, the landlord's remedy on which is made much more easy by the Stat. 4 Geo. 2, c. 28, for by that Statute, if there be a power of re-entry in default of payment, and it be proved "that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due;" the landlord need not prove all the necessary previous steps which were required by the common law. In this case, he has only to prove the above-mentioned facts, viz. the arrear of rent, and the deficiency of property for a distress after the rent became due, and about the time when the right of re-entry commenced for default of payment, (2) and also the time of serving the declaration, which, by that Statute, may either be in the usual way, "or in case the same cannot be legally served, or no tenant be in actual possession of the premises,* by affixing the same upon any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration of ejectment," which is directed to "stand in the place and stead of a demand and re-entry." As to what cases shall be deemed within the Statute, it was lately holden by three Judges of the King's Bench (Lord ELLENBOROUGH dissenting,) that even if the proviso for re-entry be in case the rent shall be in arrear twenty-one days, *being lawfully demanded*, no demand was necessary; whereas his Lordship thought that some demand was necessary, though not the strict formal demand as to time, place, &c. which was required by the common

(2) Doe dem.
Smelt v.
Fuchan, 15
East, 286.

(3) Doe dem. law. (3)

Scholefield
v. Alexander,
3 M. & S.
525.

In cases not within the Statute, viz. where there are sufficient goods to countervail the rent, the landlord is still put to all

* Vide Stat. 11 Geo. 2, c. 19, and 57 Geo. 3, c. 52, which gives a summary remedy to justices of the peace, where the premises are deserted.

the formality of proof with which he was burthened by the common law.(1) He must prove a demand by himself, or by some person duly authorised by letter of attorney from him (which should be notified to the tenant, and be ready to be produced if he requires it) of the precise sum(2) which is due, on the very day when the rent is payable to save the forfeiture, at a convenient time before sun-set,(3) as if the proviso be for re-entry, if the rent is behind thirty days after the day of payment, the demand must be on the thirtieth or last day. Therefore, a demand of a *larger* or a *less* sum, or on a day *before* or a day *after*, will not support the ejectment.

Where no particular place is appointed, it must be proved that the demand was made on the land, and at the most notorious part of it; as, if there be a dwelling-house, the demand must be at the front door;(4) but, if a particular place be appointed for payment, the demand must be made at that place;(5) and so strict is the law in the case of forfeitures, that it must be proved that the demand of rent was made, though no person was on the land to pay it;(6) while, on the other hand, if it appear that the tenant tendered the rent at any time during the last day, either on the land or elsewhere, it is sufficient on his part to save the forfeiture.(7)

The law leans as much as possible against forfeitures, and therefore where a lease contains a proviso for re-entry, the proof of acceptance of rent accrued subsequent to the cause of forfeiture will furnish a sufficient defence to the action, for, by this act, the lessor waves his right of entry.(8)(m) But it should

Ch. IX. s. 3.
On a forfeiture.

(1) Doe dem.
Foster v.
Wandlass,
7 T. Rep. 117.
Vide 7 East,
363.

(2) Fabian
v. Winston,
Cro. Eliz.
209.

(3) Harg. Co.
Lit. 202, a.
Wood v.
Chivers,
4 Leon. 179.
Doe dem.
Foster v.
Wandlass,
ubi supra.

(4) Co. Lit.
202, a.

(5) Co. Lit.
201, b.

(6) 1 Roll.
Abr. 458.

(7) Co. Lit.
201, b. &c.

(8) Goodright
dem. Walker
v. Davids,
Cowp. 803.
Roe dem.
Gregson v.
Harrison,
2 T. Rep.
425.

(m) The acceptance of rent after a forfeiture is an equivocal act and *may* or *may not* amount to a waiver of the forfeiture, according to the *quo animo* with which the rent was received. *Jones' devisees v. Roberts*, 3 Hen. & Munf. Rep. 436.

In *Virginia*, if the land be forfeited for non-payment of quit rents, want of cultivation, &c. still, if the condition be performed before the land is petitioned for, the title is saved. *Wilcox v. Calloway*, 1 Wash. Rep. 50.

When a lease for the term of seven years contained a condition that the lessee should not assign over or otherwise part with the indenture on the premises thereby leased, or any part thereof to any person, &c. and of a clause of re-entry and forfeiture for a breach of the condition, no forfeiture is incurred by an underletting for two years, or a period short of the whole term, as the words of the covenant are to be construed to mean an assignment for the whole term. *Jackson ex. d. Weldon v. Harrison*, 17 Johns. Rep. 66.

Nor can the lessor re-enter on the ground of a forfeiture, for the non-payment of rent, without shewing a demand of the rent due; his claim being regarded *stricti juris*. *ibid.*

Before the grantee of a rent charge can enter for non-payment of rent, he must make a demand of the precise amount due, on the day on which it became due,

Part II.
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ture.

(1) *Ibid.*

(2) Co. Lit.
205, a.

(3) *Vile
Williams'
Saunders,
287, b.*

also be proved, or reasonable evidence given for a jury to presume, that the lessor had notice of the forfeiture at the time he so received the rent, otherwise it is no waiver; (1) and it is to be observed, that the receipt of rent, though a waiver of a forfeiture, where there is only a proviso for re-entry, does not set up a lease which is entirely void, as if in a lease *for years*, it be provided, that in case of non-payment of rent, or the like, the lease shall be *null and void*, if the lessor make a demand, &c. the lease is absolutely at an end, and cannot be afterwards set up; (2) but in the case of a lease *for life*, the lessor could not determine the lease without entry, and, therefore, the forfeiture may be waived by an act which treats the lessee as his tenant, after notice of the forfeiture, notwithstanding the deed declares that the lease should cease and be void. (3)

SECTION IV.

Of the evidence in ejectment by creditors who have a lien on the land.

Sect. 4.
Evidence by
creditors.

A *Mortgagee* may maintain an ejectment against his mortgagor, immediately after the day of payment; (n) and though the

and on the most notorious part of the land; although the possession be vacant, and there be nothing to distrain. *M. Cormick v. Connell*, 6 *Serg. & R. Rep.* 151.

A Court of Equity will not assist in the recovery of a penalty or forfeiture, or any thing in the nature of a forfeiture. *Livingston v. Tompkins*, 4 *Johns. Ch. Rep.* 415. —*Am. Ed.*

(n) Ejectment will not lie against a mortgagee in favour of the mortgagor for the possession of the mortgaged lands, though the money should have been tendered; the remedy in such a case being by bill in equity. *Hill v. Payson et al.* 3 *Mass. Rep.* 559. *Perkins et al. v. Pitts*, 11 *Do.* 134.

The mortgagor is tenant at will to mortgagee. *Beach v. Royce*, 1 *Ros's Rep.* 244. *S. P. Beacher v. Cook*, *ibid.* 296.

A mortgagor and his alienee, are tenants at will at the option of the mortgagee. *Judd v. Woodruff*, 2 *Do.* 298.

The legal estate in mortgaged premises is vested in the mortgagee, and persons claiming under him must recover in ejectment. *Jackson ex d. Simmons et al. v. Chase*, 2 *Johns. Rep.* 84. *Jackson ex. d. Truitt v. Dubois*, 4 *Do.* 216.

But the mortgagor notwithstanding, is still deemed seized, and is the legal owner to all persons except the mortgagee and his representatives. *Hitchcock et ux. v. Harrington*, 6 *Johns. Rep.* 290. *Willington v. Gale*, 7 *Mass. Rep.* 138.

So completely is the mortgagee regarded as the owner of the freehold, that he

mortgagor may, by Statute 7 Geo. 2, c. 20, obtain relief by motion, on certain conditions, yet, on a trial, the proof will be very simple. If the mortgagor be himself in possession, proof of the execution of the deeds will be sufficient, for, as was said before, he cannot set up any title inconsistent with his own deed; (1) (1) *Vide ante*, but if a third person be in possession, the lessor of the plaintiff should also prove, that the mortgagor was in possession or receipt of rent at the time of the mortgage; and if the defendant's interest commenced previous to the mortgage, that notice to quit has been given to him; (2)* but if the mortgagor, conti-

Ch. IX. s. 4.
Evidence by
creditors.

338.

(2) *Vide*
Birch v.
Wright, 1 T.
Rep. 279.

may maintain trespass *quare clauum fregit* against the mortgagee for entering on the land and cutting trees; and if the defendant pleads *liberum tenementum*, the mortgagor may reply that the freehold is in himself. *Runyan v. Mercereau*, 11 Johns. Rep. 534.

A mortgage at law, as well as in equity, is a mere security for the payment of money; the mortgagee has only a chattel interest, and the freehold remains in the mortgagor. *Coles v. Coles*, 15 Do. 319.

But the mortgagor's possession is not adverse to the title of the mortgagee. *Higginson v. Mein*, 4 Cranch's Rep. 415. *S. P. Beach v. Royce*, 1 Root's Rep. 244.

A cestui que trust may maintain an ejectment in his own name. *Kennedy v. Fury*, 1 Dall. Rep. 72.

The assigner of the administrator of a mortgagee may maintain an ejectment in his own name. *Simpson's les. v. Ammons et al* 1 Binn. Rep. 175.

It may be maintained by the heirs of a surviving trustee, not adverse to the interest of cestui que trust. *Les. of Crunkleton et al. v. Evert et al.* 3 Yeates' Rep. 570.

The interest of mortgagee cannot be sold on an execution, yet he may maintain an ejectment against the mortgagor, and those who claim under him. *Jackson ex. d. Tatham v. Dubois*, 4 Johns. Rep. 216. *S. P. Johnson v. Hart*, 3 Johns. Cas. 322. *Jackson ex. d. Norton et al. v. Willard*, 4 Do. 41.

A resulting trust may be sold under an execution against the cestui que trust. *Forte et al. v. Cohn et al.* 3 Johns. Rep. 216.

But the equity of redemption may be levied upon and sold on execution. *Punderson v. Brown*, 1 Day's Rep. 93. *Waters v. Stewart*, 1 N. York Cus. in Er. 47. *Willington v. Gale*, 7 Mass. Rep. 138. *Porter v. Millett*, 9 Do. 101.

In Pennsylvania, the payment of a lien or charge upon land, may be enforced by ejectment. *Galbraith et al. v. Fenton et ux.* 3 Serg. & R. Rep. 359.

Ejectment will lie under a mortgage on non-payment of money, though the Act of Assembly gives a different mode of proceeding. *Les. of Smith et al. v. Buchanan*, cited 1 Yeates' Rep. 13.

But it seems it is not the proper form of action to recover a legacy charged on land. *Gause v. Wiley*, 4 Serg. & R. Rep. 509.

An equitable estate is not sufficient to support an ejectment in the Circuit Court of Pennsylvania. *Carren's les. v. Boudinot*, April, 1807, M. S. Rep.—AM. ED.

* It is said to have been ruled, in *White v. Hawkins*, B. N. P. 96, that if a mortgagee give the tenant notice that he wishes only to get into the receipt of the rents and profits, no notice to quit is necessary, though the mortgage were subsequent to the tenant's lease; and in *Dougl.* 23, Lord MANSFIELD is said to have approved of this decision. But in *Doc dem Dacosta v. Walton*, 8 T. Rep. 2, where a creditor by *elegit* brought an ejectment against a tenant under a lease prior to the judgment, having first given notice that he did not mean to disturb the tenant's pos-

Part II.
Evidence by
creditors.

nuing in possession, demise the premises after the mortgage, without the consent of the mortgagee, no notice is necessary.(1)(o)

(1) Keech
dem. Warn
v. Hall,
Doug. 21.

The next case which occurs is that of a creditor who has sued out an *elegit*. He must prove an examined copy of the judgment, and of the award and return of the *elegit*, entered on the roll. If such entry contain the inquisition, it is not necessary to prove copies taken from the *elegit* and inquisition themselves,(2) though such evidence was at one time deemed necessary.(3) If by that it appear that more than a moiety is extended, he cannot recover;(4) but it is immaterial whether a moiety of each individual close or tenement, or a moiety of the whole in value be extended.(5)

(2) Ramsbot-
tom v. Buck-
hurst, 2 M. &
S. 565.

(3) Gilb. L.
Ev. 9.

(4) Potton
v. Parbeck,
Saik. 563.

(5) Den dem.
Taylor v.
Lord Abing-
don, Dougl.
472. Bul. N.
P. 104.

The *conusee* of a *statute merchant*, in case he bring an ejectment, must prove a copy of the Statute, of the *capias si laicus*, extent and *liberate* returned; for though by the return of the extent an interest is vested in the *conusee*, yet the actual possession of that interest is required by the *liberate*.

(6) Vide Doe
dem. Dacosta
v. Walston.

The same observation applies to these cases as was before made on that of a mortgagee. If the debtor himself be in possession, this formal evidence is sufficient; but when the possession is in a third person, the plaintiff must either shew that such third person claims under the debtor, and that the defendant's incumbrance is posterior to his own, or else be prepared with evidence to support the debtor's title.(6)

session, [his object being only to get into the receipt of the rents and profits; the Court held, that the legal title must prevail, and that the ejectment could not be supported.

(o) A mortgagee, before he can bring an action of ejectment against the mortgagor, must give six calendar months' notice to quit the premises. *Jackson ex. d. Benton v. Laughhead*, 2 Johns. Rep. 75. *S. P. Jackson ex. d. Carr v. Green*, 4 Johns. Rep. 186.

But no notice is necessary in an ejectment brought by the mortgagee against the purchaser of the mortgagor's interest or against a third person between whom and the mortgagee there is no privity. *Jackson ex. d. Ferris v. Fuller*, *ibid.* 215. *S. P. Jackson ex. d. Simmons et al. v. Chase*, 2 Johns. Rep. 84.

A disclaimer by a tenant dispenses with a notice to quit. *Jackson ex. d. Locke*!! *et al. v. Wheeler*, 6 Johns. Rep. 272.

A tenant at sufferance is not entitled to notice. *Jackson ex. d. Van Courtlandt v. Parkhurst et al.* 5 Johns. Rep. 128. *Jackson ex. d. Anderson et al. v. M'Leod*, 12 Do. 182.—AM. ED.

CHAP. X.

OF EVIDENCE IN THE ACTION FOR MESNE PROFITS.

IN the action for *mesne profits*, against the tenant in possession after judgment in ejectment, the title of the plaintiff, or his lessor, subsequent to the day of the demise in the declaration, cannot be disputed ; and, therefore, whether the action be brought in the name of the nominal plaintiff in ejectment, or in that of his lessor, this fact, and that of the plaintiff's possession, are sufficiently established by proof of examined copies of the judgment in ejectment, of the writ of possession, and of the Sheriff's return thereon.*(a) And if the action be brought by two, and

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Mesne profits.

* Mr. J. BULLER (*N. P.* 87,) says, that when the judgment is against the tenant in possession, and the action of trespass is brought against him, it seems sufficient to produce the judgment, without proving the writ of possession executed ; and Mr. Serj. RUMMINGHAM (*Law Eject.* 242,) says that such is the practice. Both agree that the practice is otherwise where there has been a judgment by default : but the latter author observes, that this piece of evidence does not seem to be necessary in either case, for as the tenant is concluded, by the judgment in ejectment, from controverting the plaintiff's title, he is consequently precluded from disputing his possession, which in this possessory action is part of it. The grounds on which the Court proceeded in *Astin v. Parkin*, (2 Burr. 667,) appear to warrant this observation ; but in the course of the argument of *Compere v. Hicks*, 7 T. Rep. 730, the Court is reported to have said, " That confession of lease, entry, and ouster, will not enable the party to recover the mesne profits. The plaintiff must have a writ of possession, and then the entry under it will be referred to the time of the title."

(a) An action for mesne profits is an equitable suit, and will allow of every equitable defence. *Murray v. Gouverneur et al.* 2 Johns. Cas. 438.

Where there is a contract for the purchase of the land, under which the purchaser enters into possession but afterwards does not comply with his purchase, the vendor must resort to an action of *trespass* and *ejectment* to recover the mesne profits. *Smith v. Stewart*, 6 Johns. Rep. 46.

In an action of *ejectment*, *mesne profits* may be recovered by way of damages. *Boyd's les. v. Cowan*, 4 Dall. Rep. 138.

The right to mesne profits is a necessary consequence of a recovery in ejectment. *Benson et al. v. Matsdorf*, 2 Johns. Rep. 369.

A recovery of nominal damages in ejectment, is no bar to an action for the mesne profits. *Van Allen v. Rogers*, 1 Johns. Cas. 281.

In an action of trespass for mesne profits, an innocent possessor may set off improvements made on the land. *Marie v. Semple*, *Addis. Rep.* 215.

A recovery in ejectment will be conclusive on the defendant as to a suit in an action for *mesne profits*, though the defendant should plead a recovery back again by

Part II.
Mesne profits.

(1) *Charniere*
v. Clings,
1 M. & S. 64.

the declaration in ejectment contain two counts, one on the demise of each, the judgment obtained on such declaration will support the joint action.(1)

In addition to this evidence, the plaintiff must prove the length of time that the defendant has been in possession of the land, the annual value, or value of the crops taken from it, and the costs of the ejectment, in case they have not been already recovered. He may also, when such fact is specially alleged in the declaration, give evidence of any injury done to the premises, in consequence of the misconduct of the defendant after the expiration of the tenancy.

If the plaintiff seek to recover profits accrued *before* the time of the demise laid in the declaration, he must, in addition to the former evidence, prove his title; and, as the nominal plaintiff has not any title, the action, in such cases, must always be brought in the name of his lessor.(b) The defendant will be at

him, and it appears that the defendant had a better title. *Benson et al. v. Maudslayi*, 2 Johns. Rep. 369.

After a recovery in ejectment by default against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits against the tenant, and may also recover the costs of the action of ejectment; and the defendant is not allowed to offer any defence against the demand of the plaintiff which would have been a bar in the original action. *Baron v. Abeel*, 3 Johns. Rep. 481.

In an action of trespass for mesne profits, the title cannot ordinarily come in question. *Jackson v. Randall*, 11 Johns. Rep. 405.

No defence can be set up in an action for the mesne profits of land recovered under a regular judgment by default in ejectment. *Langendyck et ux. v. Burhan*, *ibid.* 461.

This action will lie after a recovery in ejectment, even though the plaintiff have since conveyed the land by deed to the defendant with special warranty. *Deffield v. Stille*, 2 Dall. Rep. 156. S. C. 1 Yeates' Rep. 154.

But after a recovery in ejectment, trespass will not lie against one who was no party to the suit, without proof of an actual trespass by the defendant. *Alexander v. Herbert*, 2 Call's Rep. 508.—AM. ED.

(b) It has been ruled in *Pennsylvania*, that in trespass for *mesne profits*, after a recovery in ejectment, that the plaintiff shall not give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration in ejectment. *Shotwell v. Boehm*, 1 Dall. Rep. 172.

In an action for *mesne profits*, it is sufficient for the plaintiff to produce the verdict and judgment where there has been a confession of entry, without proving title to the land or an entry under the judgment. But where the judgment was by default, an entry must be proved. *Les. of Brown v. Galloway*, 1 Peters' Rep. 391.

In trespass for mesne profits, an innocent possessor may set off improvements. *Marie v. Semple*, *Addis. Rep.* 215.

The general rule in trespass for mesne profits is, that the plaintiff shall recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years, in which case the Statute of Limitations may be pleaded. *Hare v. Furey*, 3 Yeates' Rep. 13.—AM. ED.

liberty to controvert this title.(1) In like manner, when the action for mesne profits is brought against a person who had parted with the possession previous to the action of ejectment, the plaintiff must prove his title;(2) for the recovery in ejectment is no evidence against a person who was not in possession, and, therefore, could not be served with it; and even if recovered against the wife, and an action for the mesne profits be afterwards brought against the husband and wife, such judgment is not admissible as evidence.(3) So where the action is brought against the landlord to the person who was served with the ejectment, as tenant in possession, who suffers judgment by default,(4) such judgment is not sufficient without shewing that the landlord had notice of the ejectment.

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(1) *Dacosta v. Atkins*,
Bul. N. P. 87.

(2) *Ibid.*

(3) *Dunn v. White*, 7 T.
Rep. 112.

(4) *Hunter v. Britt*,
4 Campb. 455.

Where an entry was necessary to avoid a fine, the defendant may, by proof of the fine, prevent the plaintiff from recovering any profits which accrued before the time of the entry, which in such case the plaintiff should be prepared to prove.

Compere v. Hicks, 7 T.
Rep. 727.

In cases where the plaintiff does not enter into evidence of title, the defendant's evidence will of course be confined to the value of the profits, and the time of his possession; and if the plaintiff claim profits for more than six years, the defendant must plead the *Statute of Limitations*, to prevent his recovering any damages for the profits taken previous to that time. This action is now rendered in a great measure unnecessary in the case of landlord and tenant, by the Statute 1 *Geo.* 4, c. 87, referred to, ante, c. 9, s. 3.

CHAP. XI.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST HUSBAND AND WIFE, OR BY A HUSBAND, PARENT, OR MASTER.

SECTION I.

Actions by and against husband and wife.

Part. II.
Action by
husband and
wife.

Norwood v.
Stevenson,
Andr. 237.
Vide ante, 44.

IN cases where the husband and wife are joint *plaintiffs*, the marriage, if put in issue, should be proved by an examined copy of the register, or by some person present at the time ; but when they are *defendants*, proof that they cohabited together as husband and wife is conclusive upon them ; for a man who permits a woman to pass in the world as his wife, will not afterwards be permitted to say that she is not so. (a)

(a) Husband and wife may join in an action of account for rents and profits of the wife's lands accruing during the marriage. *Lewis v. Martin*, 1 *Day's Rep.* 955. See vide *Chancey v. Strong*, 2 *Root's Rep.* 369.

They must join in an action of trespass against one who has entered on the wife's lands. *Byrne et ux. v. Van Hoesen*, 5 *Johns. Rep.* 66.

They must join in an action of detinue for the slave of the wife detained before and at the time of marriage. *Johnston v. Pasteur*, *Rep. in Co. of Conf.* 464. 2 *Hayw. Rep.* 187. *ibid.* 231. *ibid.* 306. *S. P. Norfeis v. Hurris*, *ibid.* 517.

Trespass will lie against husband and wife for a joint trespass. *Wright v. Kerr et ux. Addis. Rep.* 13.

Where the husband is sued as administrator in right of his wife, she ought to be joined, because if husband should die, the action would survive against the wife. *Moore v. Suttril's adms.* 1 *Hayw. Rep.* 16.

If husband and wife join in an action, the reason why they are joined must appear on record, or the judgment will be reversed on a writ of error. *Staley v. Bartie*, 2 *Caines' Rep.* 231.

A declaration, charging husband and wife with a joint assumption, in consideration of money had and received by them to the plaintiff's use, is bad. *Grassar et ux. v. Echart et ux.* 1 *Binn. Rep.* 575.

Husband and wife cannot join in suing a popular action. *Hill et ux. v. Davis et al.* 4 *Mass. Rep.* 137.

Nor in an action for an injury done to the husband. *Munroe v. Maples*, 1 *Root's Rep.* 432. Vide *Cheesborough v. Baldwin*, 1 *Root's Rep.* 239.

An action brought by the husband and wife, in right of the wife, will abate by the death of the wife. *Archer v. Colly et ux.* 4 *Hen. & Munf. Rep.* 410. *S. P. Moore v. Suttril's adms.* 1 *Hayw. Rep.* 16.

But in such a suit, if the husband die, the right survives to the wife, and on her

But when only the *general issue* is pleaded, whether in *assumpsit*, case, or trespass, there is no necessity to prove the marriage. If, therefore, husband and wife sue for a debt due to the wife before the marriage, or for an assault committed upon her, and the defendant plead the *general issue*, the plaintiffs will not be obliged to give further evidence of their relationship to each other than is sufficient to shew that the woman who sues as the wife of *A.* is the person with whom the contract was made, or on whom the assault was committed; and the defendant will not, on this issue, be at liberty to dispute the marriage.

Ch. XI. s. 1.
Action by
husband and
wife.

Dickenson &
Wife v. Da-
vis, 1 Stra.
480.

SECTION II.

Actions by husband alone.

WHEN the husband sues alone to recover damages, in consequence of the defendant's misconduct towards his wife, he must strictly prove the marriage, although only the *general issue* be pleaded; for the plea of not guilty, in this case, puts the facts of the marriage in issue; as, without that fact, the defendant has committed no injury to the plaintiff individually.

Sect. 2.
Crim. Con.

Morris v.
Miller, 4
Burr. 2057.

In actions for *criminal conversation*, therefore, the plaintiff must prove the actual marriage and identity of himself and his wife. (b) No reputation, nor even an admission by the defendant

death the suit should not be revived in the name of his administrator. *Vaughan et ux. v. Wilson*, 4 Ben. & Munf. Rep. 452.

The husband cannot sue alone, for the debt of his wife, contracted before their marriage. *Angel v. Felton*, 8 Johns. Rep. 115. Et vide *Gage v. Reed*, 15 Do. 403.

The husband must be joined in suits brought for an injury done to the wife. *Donaldson v. Maginnes*, 4 Yeates' Rep. 127.—Am. Ed.

(b) The husband cannot support an action for *crim. con.* after a separation with his wife, provided such agreement was voluntary on the part of the husband. *Frey v. Dersler*, 2 Yeates' Rep. 278.

So, where the injury is stated to have been committed within certain days, proof of improper freedom must be first proved within the limited time, before evidence of the trespass at a different time can be received. *Gardner v. Madara*, 2 Yeates' Rep. 466.

In this action the declaration of the defendant that he knew *A.* was married to the plaintiff, and with that knowledge had seduced her, may be given in evidence in proof of the marriage. *Forney v. Ballacher*, 8 Serg. & R. Rep. 159.—Am. Ed.

Part. II.
Action for
crim. con.

Burt v. Bar-
low, Dougl.
162.

(1) Woolston
v. Scott, Bul.
N. P. 28.
Vide Ganer
v. Lady
Lancastro',
Peake's Cas.
17.

(2) Edwards
v. Cooke, 4
Esp. Cas. 59.

(3) Trelawney
v. Coleman,
1 B. & A. 90.

(4) Vide
Winsmore
v. Green-
bank, Bul.
N. P. 78.

Vide ante, 13.

(5) Wynd-
ham v. Lord
Wyncomb,
4 Esp. Cas 16,
and Street v.
Marquis of
Blandford,
there cited.

(6) Bromley
v. Wallace,
ibid, 237.

(7) Smith v.
Allison, Bul.
N. P. 27.
Hodges v.
Wyndham,
Peake's Cas.
39.

that he had committed adultery with the plaintiff's wife, will be sufficient in this case. But when the marriage is proved by the register, the parties may be identified by any other evidence which satisfies the jury; as the proof of their hands writing subscribed to the register, or the circumstance of their afterwards giving a wedding-dinner, and presiding at it as the persons married; and this, although the subscribing witnesses present at the marriage are living. In the case of sectaries, who marry contrary to the usual ceremonies of the church, a marriage according to their rites will be sufficient.(1)

The ground of the action being the loss of the wife's affection and society, all evidence which tends to shew that they lived affectionately together, is proper to be adduced on the part of the plaintiff. Even letters from the wife to her husband may be admissible under some circumstances, as where, during his absence, she writes letters of affection to him, and it is clearly shewn that such letters were written before the defendant became acquainted with her;(2) but unless the latter fact be clearly made out, the letters will not be admitted.(3) If the plaintiff has lost any expectations of fortune in consequence of the seduction of his wife, it will also be proper evidence on his part,(4) as will, in many cases, the rank and circumstances of the defendant.

The defendant will be permitted to shew in mitigation of damages, that the wife was a woman of loose conduct, and one whose society was of but little value.(c) So if the husband has ill-treated his wife, or connected himself after his marriage with other women, this also is proper matter to be given in evidence by the defendant, and generally has considerable effect in reducing the damages. Indeed, the circumstance of the plaintiff's connection after marriage with other women, was holden by Lord KENYON in two cases,(5) to furnish a defence to the action; but Lord ALVANLEY, in a subsequent case,(6) held, that it only went in mitigation of damages. So the defendant may prove that the plaintiff consented to his wife's adultery with the defendant or with other men;(7) and if this be satisfactorily proved, the action will fail altogether, for a husband who has so prostituted his wife, will not be permitted to sue as a plaintiff in a Court of justice. It should here be observed, that great caution is necessary in the introduction of evidence of this description, for unless most clearly and satisfactorily made out, it will

(c) *Torre v. Sommers*, 2 Nott & M'Corke's Rep. 267.—AM. ED.

always much aggravate instead of diminishing the damages. In one case, where the husband and wife were parted by articles of separation, it was determined, by the Court of King's Bench, that this circumstance alone was a bar to any action for adultery, subsequently committed ;(1) but, in a very late case, the propriety of this decision was much doubted.(2)

The action for harbouring a wife, who has eloped from her husband, is frequently brought against some relative of the wife, to whom is not imputed any criminal feeling towards her.(3) In this case the conduct of the husband and wife towards each other will form the principal, but not the only subject of inquiry ; for to maintain the action, it must be shewn that the defendant obstinately harbours her when he knows that she ought to be under the coercion of her husband. It is therefore permitted to him, for the purpose of disproving this fact, to shew not only actual ill-treatment by the husband, but any representation of the wife at the time she came to his house and sought his protection. A representation made by her at a subsequent time is not admissible.

Ch. XI. s. 2.
Action for
crim. con.

(1) Weeden
v. Timbrel,
5 T. Rep. 357.

(2) Chambers
v. Caulfield,
6 East, 244.

Action for
harbouring
wife.

Philp v.
Squire, and
Winsmore v.
Greenbank,
ante, 38.

SECTION III.

Actions by a parent or master.

A PARENT may maintain an action for any assault upon, or injury done to his child, whilst such child remains part of his family. The strict ground of the action is the loss of the service which the child might have performed for the parent ; and though it has been holden, that it is not necessary to shew that in fact

Sect. 3.
Actions
by parent or
master.

(d) In *Massachusetts*, it has been ruled, that an action will not lie by the husband against the defendant for permitting his wife's mother to reside in his house, and affording her the rights of hospitality, even though the husband should forbid it. *Turner v. Estes*, 3 *Mass. Rep.* 317.

In *New York*, it lies by a husband against the father of his wife for enticing her away ; but that the jury should have much stronger evidence of *malicious and improper motives* in the defendant than in other cases. *Hutcheson v. Peck*, 5 *Johns. Rep.* 196.

And the *quo animo* is the material point of inquiry. *ibid.*

An action for damages lies in favour of the husband against a surgeon for unskillfully operating upon his wife, though she should die of the operation. *Cross v. Guthery*, 2 *Roof's Rep.* 90.—*Am. Ed.*

Part II.
Actions
by parent or
master.

Seduction.

(1) *Jones v. Brown*,
Peake's Cas.
253.

(2) *Dunn v. Peel*, 5 East,
45.

(3) *Fores v. Wilson*, *Peak. Cas.* 55. *Edmondson v. Maobel*, 2 T. Rep. 4.
Irvin v. Dearman, 11 East, 94.

(4) *Booth v. Charlton*, cor. *Wilson J.* cited 5 East, 47.

Bennett v. Alcott, 2 T. Rep. 156.

(5) *Johnson v. M'Adam*, 5 East, 47.

(6) *Vide ante*, 241, pl. 11.

the child was accustomed to perform any menial office, or other service in the family, but that it is sufficient if he or she were living in the parent's house, and under his protection,(1) yet it must be proved that the child did so reside. Therefore a parent, whose daughter has a permanent and fixed residence in another family, cannot maintain any action against the person who seduces her, though she be under age.(2) In this case, however, the person with whom she resides may maintain the action.(3) When the daughter resides with her parent, though she be above twenty-one years of age, he may maintain the action;(4) and so he may also if her general residence be at his house, and she is seduced while on a visit at the house of another person with his consent.(5)(e)

To support the action, the girl herself may be a witness, and prove any facts or circumstances attending the seduction, except such as would support another action at her own suit for a breach of promise of marriage.(6)(f) The defendant on his

(e) No action lies by a woman against a man for seducing her, under a false pretence of courtship and intention of marriage, and getting her with child. *Paul v. Frazier*, 3 *Mass. Rep.* 71.

Case lies for debauching a man's daughter and getting her with child, *per quod servitium amisit*. *Ream v. Rank*, 3 *Serg. & R. Rep.* 315.

A father may maintain an action on the case for the seduction of his daughter *per quod, &c.* though at the time she did not reside with him; provided she was subject to his control, and he was entitled to command her services. *Hornketh v. Barr*, 8 *Do.* 36. *S. P. Johnston v. Caulkins*, 1 *Johns. Cas.* 116.

But in an action for a breach of a promise of marriage and for seduction, the defendant was not allowed to give in evidence the general bad character of the plaintiff between the promise and the breach, in mitigation of damages. *Boynston v. Kellogg*, 3 *Mass. Rep.* 189.

Action by parent.

An action will lie by the father for enticing away a minor child, and procuring her to be fraudulently married, whereby he sustained damage. *Hills v. Hobert*, 2 *Root's Rep.* 48.

In *South Carolina*, under the Statute of 5 *Philip and Mary*, c. 8, extended to that State, where the defendant seduced away from her father's house a maid under sixteen years of age, without the consent of parents or guardian, he is liable to be punished, whether he marry her or not. *The State v. Findlay*, 2 *Bay's Rep.* 418.

But an action will not lie in favour of a mother, as a mother, for the service of a minor son, where it does not appear the father is dead. *Burk v. Phips*, 1 *Root's Rep.* 487.

A mother as such has no legal authority over a son, and is not entitled to his services, while he lives with her. *Commonwealth v. Murray*, 4 *Binn. Rep.* 418.

No action will lie in favour of a woman against a man for seducing and getting her with child, under pretence of a design to marry her, no promise of marriage being proved. *Paul v. Frazier*, 3 *Mass. Rep.* 71.—*Am. Ed.*

(f) In an action for breaking and entering the house of the plaintiff, and getting his daughter with child, the daughter is a competent witness. *Mott v. Goddard*, 1 *Root's Rep.* 472. *S. P. Seager v. Sligerland*, 2 *Caine's Rep.* 219.

part may, as in the case of adultery, prove the loose character of the girl, or the misconduct of the parent himself in voluntarily permitting an illicit connection to be formed between the defendant and his daughter, which latter fact will destroy the right of action altogether, (1)(g)

Ch. XI. s. 3.
Actions
by parent or
master.

(1) Reddie v.
Scoutt, Peak.
Cas. 240.

The action for seducing or harbouring an apprentice or hired servant, materially differs from those for adultery, or debauching a daughter. (2)(h) The act of the defendant, in these latter cases, being itself illegal, no proof is required of his knowledge of the relationship which subsisted between the plaintiff and the person seduced; but to support an action for enticing or harbouring an apprentice or hired servant, it must be proved that the defendant knew at the time he committed the injury which is complained of, that the person in respect of whom the action is brought, was the apprentice or servant of the plaintiff. To sustain this action therefore, the plaintiff must, in the first place, prove the contract between himself and the person seduced, and then either that the defendant, knowing of such contract, enticed him from the plaintiff's service, or else that the defendant harboured the servant after regular notice of his contract with the plaintiff, and a requisition to the defendant to deliver him up, or not to harbour him any longer.

(2) Fores v.
Wilson, ubi
sup.

Fawcett v.
Bavres, 2
Lev. 63.

But the daughter cannot be a witness to prove a promise of marriage in aggravation of damages, for she has herself a right of action therefor. *Foster v. Schaffield*, 1 Johns. Rep. 297.—AM. Ed.

(g) A father cannot maintain an action for debauching his daughter *per quod servitium amisit*, if it appear in evidence, that he consented to, or connived at, the intercourse with the defendant. *Seager v. Sligerland*, 2 Caines' Rep. 219.

But the grounds of the suit are the loss of service and expenses of lying-in, it is therefore no defence to shew the daughter to be unchaste, unless the father connived at her criminal intercourse; the want of chastity may be given in evidence in mitigation of damages. *Akerley v. Haines*, *ibid.* 292.—AM. Ed.

(h) A master may maintain an action for the battery of his slave. *White v. Chambers*, 2 Bay's Rep. 70.

In an action on the case for enticing away the defendant's servant, the general rule of damages, is the value of the service during the period the servant was in the defendant's employ; but the jury may, in certain aggravated cases, give the whole value of the servant by way of damages. *Dubois v. Allen*, 1 Anth. N. P. Cas. 68.

Under a count for harbouring or entertaining a servant, evidence of enticement is not necessary. *ibid.*—AM. Ed.

CHAP. XII.

OF THE EVIDENCE IN CASES OF BANKRUPTCY.

SECTION I.

In actions by and against the assignees.

Part II.
Action by or
against the
assignees.

Bul. N. P. 87.

If assignees of a bankrupt bring an action of *trover* for the goods of the bankrupt, or *assumpsit* on a promise made to him before his bankruptcy, or on an implied promise to themselves as assignees afterwards, (a) and the defendant pleads the *general*

(a) Assignees of a bankrupt may maintain an action against a Sheriff for non-collection of an execution placed in his hands. *Sullivan v. Bridge*, 1 *Mass. Rep.* 512.

Where the bankrupt and his creditor contemplated a transfer of the debt, to pay one of the bankrupt's creditor, but which was not completed, it was held that his assignees could recover the amount from the creditor. *Foster et al. v. Lowell*, 4 *Mass. Rep.* 308.

The assignee of a bankrupt may bring an action in his own name, for the recovery of real estate assigned to him. *Wickham v. Waterman*, *Kirb. Rep.* 273.

The assignees of a bankrupt may bring an action of ejectment. *Barstow v. Adams*, 2 *Day's Rep.* 70.

The assignees of a bankrupt, can bring an action for the rents and profits of land held under a fraudulent deed, due since the act of bankruptcy, or the time the right of the creditors to call him to account accrued. *Sands et al. v. Codwise et al.* 4 *Johns. Rep.* 586.

An action cannot be brought in the bankrupt's name for a debt contracted before the bankruptcy, after he has made an assignment. *Elderkin v. Elderkin*, 1 *Root's Rep.* 139.

So in the case of one discharged under an insolvent law. *Young v. Wilking et al.* 2 *Dall. Rep.* 276.

A discharge under the insolvent law of *Pennsylvania*, 26th March, 1814, releases the defendant's person from liability for a note drawn by him before his discharge, but payable afterwards. *George v. Hoover*, 3 *Serg. & R. Rep.* 559.

But one who has made an assignment under the insolvent law, may maintain an action in his own name for a malicious abuse of legal process in seizing goods prior to the assignment. *Sommer v. Wilt*, 4 *Serg. & R. Rep.* 19.

The assignees of a bankrupt are not entitled to come in and prosecute a *real* action commenced by the bankrupt. *Fales v. Thompson*, 1 *Mass. Rep.* 134.

Torts are not transferred by the bankrupt under the assignment. *Stanly v. Dahurst*, 2 *Root's Rep.* 52. *S. P. Shoemaker v. Keely*, 2 *Dall. Rep.* 213. *S. C. 1 Yeates' Rep.* 245.

Quere, Whether the bankruptcy of the plaintiffs can be given in evidence in an action of *assumpsit*, under the general issue. *Bird et al. v. Pierpoint*, 1 *Johns. Rep.* 117.

A commission of bankruptcy in *England*, does not secure the debtor's effects in

issue; the plaintiffs must prove not only property in the goods to support their action of *trover*, or the consideration to support the promise, but also the trading of the bankrupt, the act of bankruptcy,* the petitioning creditor's debt, the commission and

Ch. XII. s. 1.
Action by or
against the
assignees.

Abbot v.
Plumbe,
Doug. 205.

this country; but they remain liable to the attachment of their creditors, as well

British as American. *Taylor et al. v. Geary et al. Kirb. R.p.* 313.

In one case in *New York*, it was doubted whether the assignees of one made a bankrupt in *England* could sue in the *United States* as such? *Bird et al. v. Pierpoint*, 1 *Johns. Rep.* 117.

In a subsequent case it was ruled, that a suit may be instituted in the name of a foreign bankrupt, and he may be joined with the assignees of a co-partner who is a bankrupt in this country; it is a principle among nations to admit and give effect to the title of foreign assignees, in cases of bankruptcy; but the mode of proceeding to recover the debts of the bankrupt, whether in *his own* name or the name of the assignees, depends on the forms of proceeding in the Court where such action is brought. *Bird et al. v. Curisut*, 2 *Johns. Rep.* 342.

An assignment by commissioners of bankrupts in *England*, does not operate a legal or equitable transfer of the property of a bankrupt in *Pennsylvania*; so as to prevent a foreign attachment by an *American* creditor. *Milne v. Moreton*, 6 *Binn. Rep.* 353.

The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the *U. States.* *Harrison v. Sterry et al.* 5 *Cranch's Rep.* 239.

In *Maryland*, an attachment issued by the plaintiff's residing in *Great Britain*, was quashed on the ground that such creditors were bound by a Statute of bankruptcy, and could not attach the bankrupt's estate. *Burk et al. v. Mc Clain*, 1 *Har. & M. Hen. Rep.* 236.—*Am. Ed.*

* To show *quo animo* the bankrupt left his house, his declaration at the time as to his fear of an arrest may be proved; but any declaration at another time, when no act is done by him, is not evidence. *Ambrose v. Clendon*, *Cas. Temp. Hardw.* 267. *Bateman v. Bailey*, 5 *T. Rep.* 512.

Where a trader having drawn a bill of exchange, afterwards and before it became due said it would not be paid, such declaration was received to dispense with the want of notice of the subsequent dishonour, though previous to making it the trader had committed an act of bankruptcy, which was afterwards made the ground of a commission. *Brett, Ass. Etc. v. Levett*, 13 *East*, 218.

In the above case it appears that the Court of King's Bench held the bankrupt's declaration, after the act of bankruptcy, to be evidence against a third person who disputed the commission; and in a subsequent case, where the bankrupt brought an action against his assignees, the same Court held that the circumstance of the bankrupt and his petitioning creditor, having attended before the commissioners at their second meeting, and there produced their accounts, when the bankrupt objected to part of the demand, and the commissioners ticked off such items as he allowed, and struck a balance, though it could not be considered as an award or adjudication by the commissioners, either as arbitrators appointed by the parties, or in their official character of commissioners, was still evidence to be left to the jury of an admission by the bankrupt. *Jurrott v. Leonard*, 2 *M. & S.* 265. But the Court of Common Pleas determined, that in an action by the assignees against a third person, even an account signed by the bankrupt, charging himself with a balance a day before the act of bankruptcy, was not admissible to prove the petitioning creditor's debt, without positive proof that the accounts had been allowed before the act of bankruptcy. *Hoare v. Coryton*, 4 *Tunst.* 560.

Part II.
Action by or
against the
assignees.

(1) *Hale v. Small, 2 Bro. & B. 25.*

(2) *Abbot v. Plumbe, Dougl. 205.*

(3) *Doe dem. Mawson v. Liston, 4 Taunt. 741,*

assignment. The commission generally describes the bankrupt as carrying on some particular trade, but this does not bind plaintiff to prove him of the trade so described; for if the commission is against the proper person, the plaintiff may prove the trading in any article, though not described in the commission.(1) The petitioning creditor's debt must be proved by same kind of evidence as would be required in an action against the bankrupt himself; if it is by bond, the subscribing witness must be called (2)(b) If the petitioning creditor is an executor the probate must be produced; or if he is himself assignee another bankrupt, who was the creditor of the bankrupt in particular case, he must give the regular proof of the trading and bankruptcy of both these persons.(3)

The regular proof of the assignment will be its production and proof by the subscribing witness; and if a former assignee has been removed and a new one appointed, the assignment from the old assignee to the new one must be proved in manner; for the Lord Chancellor's order for the purpose is

(b) In an action by the assignee of a bankrupt against the Sheriff, the assignee must prove the debt of the petitioning creditor. *Lowell v. Cutler, 1 Mass. R.* Under the Act of Bankruptcy in *Pennsylvania*, analogous to the *British* in a trial at law, the creditor may controvert the trading, bankruptcy, and conformity of the defendant, and that the certificate is but *prima facie* and not conclusive evidence of the proceedings before the commissioners. *Pleasant v. Meng, Dall. Rep. 380.*

So in another case the commission was held to be *prima facie*, and not conclusive evidence of the trading and act of bankruptcy of the bankrupt. *Rugan v. 1 Binn. Rep. 263.*

The certificate of a bankrupt's conformity is *conclusive* evidence of the trading commission, and of the trading and bankruptcy, in an action by the assignee against the debtor of the bankrupt; but is only *prima facie* evidence of such in an action by a creditor against the bankrupt, and under the replication that the certificate was *unfairly obtained*, it was competent for the plaintiff to prove that the defendant was not a trader within the meaning of the Act of Congress. *Blythe v. Johns, 5 Binn. Rep. 247.*

In *North Carolina*, the production of the commission and assignment is evidence of the trading bankruptcy, the time thereof, and the appointment of the plaintiff assignee. *Barclay's ass. v. Carten, 2 Hayw. Rep. 243.*

In *Connecticut*, it has been ruled, that under the late Bankruptcy Law of the *States*, the validity of a commission of bankruptcy cannot be impeached by the Common Law Courts. *Burslow v. Adams, 3 Day's Rep. 70.*

It is competent for any person interested to contest the petitioning creditor's debt, but whether creditors who have received a dividend under the commission prevented *dubitation*. *Joy's les. v. Cossart, 2 Dall. Rep. 126. S. C. 1 Rep. 50.*

In an action by the assignees of a bankrupt, confession of judgment and assignment and right of action, to be in the plaintiff, agreeably to the nature of the case. *Holdship, 1 Browne's Rep. 36.—AM. ED.*

sufficient to take the property out of the old assignee, and vest it in the new one.(1) But though the production and regular proof of the assignment is in general required, yet where the defendant had treated with the plaintiff as the assignee, accounted with him as such, and paid part of the debt, that fact was held to be *prima facie* evidence of the assignment, and to dispense with formal evidence to prove it.(2) The mode of proof in these cases is rendered much more easy by a late Act of Parliament,(3) by which it is enacted, "That in any action by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined in such action, give notice in writing to such assignee, that he intends to dispute such matters or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the Judge before whom the cause shall be tried, shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial, and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such assignee." It is to be observed, that the Act of Parliament has made the proceedings under the commission "evidence to be received" of the facts proved before the commissioners, but has not said that they shall be conclusive. It has therefore been held,(4) that though a party who has not given notice of his intention to dispute the facts necessary to support the commission, cannot call on the other side to give further evidence than the production of the proceedings, yet that he is not precluded from giving evidence on his part to contradict the fact so proved.

The Act of Parliament extends not only to those cases in which the assignees are themselves parties as plaintiffs or defendants, but also to those where the party must necessarily deduce his title under the commission;(5) but in actions between third persons, when the validity of the commission comes only incidentally into question, the law remains the same as

Ch. XII. s. 1.
Action by or
against the
assignees.

(1) Bloxam
v. Hubbard,
5 East, 407.

(2) Dickenson
v. Coward,
1 B. & A. 677.

(3) 49 Geo. 3,
c. 121, s. 10.

(4) Mills v.
Bennett, 2 M
& S. 556.

(5) Symonds
v. Knight,
3 Campb. 30.

Part II.
Action by or
against the
assignees.

(1) Doe dem.
Mawson v.
Luton, 4
Taunt. 741.

(2) Rankin
v. Horner,
16 East, 191.

Doe dem.
Edgill v.
Mitchell, 2 M
& S. 446.

Rex v. Hop-
per, 3 Price,
495.

Vide Evans
v. Mann,
Cowp. 569.

before the Statute, and the several facts necessary to establish the bankruptcy must be proved by the ordinary evidence. (1) A person who has proved his debt under the commission, is not thereby precluded from disputing the petitioning creditor's debt, or calling the same evidence as any other third person. (2)

The modes of assigning the personal and real property of the bankrupt, differ not only in form, but materially in their effects on those different species of property. In the former the commissioners merely execute the deed and that by relation vests all property in the assignee from the time of the act of bankruptcy. But the freehold property of the bankrupt can be transferred only by bargain and sale enrolled in one of the King's Courts of record; and though when so enrolled, it defeats all grants made after the bankruptcy, yet it vests the estate in the assignees only from the time of the enrolment, so that a demise by them in ejectment must be laid after that time. The enrolment being thus made a part of the title, the assignee must prove that as well as the execution of the deed; but the officer's endorsement, or an examined copy of it, is sufficient to prove not only the fact of enrolment, but the time it was made.

But in cases where the assignees themselves make a contract with a third person, and have occasion to sue upon it, it seems to be unnecessary for them to name themselves assignees in the declaration, or to give evidence to prove that they fill that relation.

SECTION II.

In actions by and against the bankrupt.

Sect. 2.
Action by
bankrupt.

Mercer v.
Wise, 3 Esp.
Cas 316.

5 Geo. 2,
c. 30, s. 7.

WHERE a person has been found a bankrupt, and brings an action against the messenger or assignees for the goods taken, the defendant must be prepared with evidence to prove the trading, &c. as in the other case, notwithstanding the bankrupt has surrendered to his commission, and passed his examination.

But when the bankrupt is sued for any debt from which he is discharged by his certificate, and pleads such discharge,* no

* When a bankrupt who has obtained his certificate is afterwards sued for any debt due before his bankruptcy, the Statute gives a general form of plea that he

further evidence is required on his part, than the production of the certificate allowed by the Lord Chancellor; and the creditor may avoid it by shewing that it was obtained *unfairly* and by fraud, or else that there has been a concealment by the bankrupt of effects to the value of 10*l*. As to what shall be deemed an unfair or fraudulent obtaining of a certificate, it has been holden, that if money be given either with the bankrupt's privacy or without to any one creditor to induce him to sign it, or to withdraw a petition which he has presented against it, the certificate is void. But if the plaintiff prove an omission to account for effects amounting to 10*l*. the bankrupt may prove that it was not wilful or fraudulent.

Ch. XII. s. 2.
Action against
bankrupt.

(1) Robson
v. Calze,
Douglt. 328.
Holland v.
Palmer, 1
Bos. & Pul.
95.

(2) Sumner
v. Brady,
1 H. Black.
647.

(3) Cathcart
v. Blackwood,
Cul. H. L.
384.

was discharged as a bankrupt; and that the cause of action accrued before such time as he became bankrupt. This plea concludes to the country, and on the *similitur* being added, all the special matter either to support or defeat the certificate may be given in evidence without further pleading on either side. *Altop v. Price*, Douglt. 160. *Hughes v. Morley*, 1 Barn. & Ald. 22. It was for some time doubted whether this general plea was given to the defendant in cases where the certificate was not completed till after the commencement of the action, (*vide Tower v. Cameron*, 6 East, 413;) but it is now settled that the defendant may so plead if the certificate be allowed any time before plea pleaded, though after the commencement of the suit, provided he were a bankrupt before. *Harris v. James*, 9 East, 82.

* This case is mentioned in *Co. B. L.* 284, but no notice is there taken of this point.

(c) An action, pending against a bankrupt, at the time he obtained his certificate for a demand, which was or might have been proved under the commission, cannot afterwards be prosecuted to judgment. *Payson adm. v. Payson et al.* 1 Mass. Rep. 283.

Statutes of bankruptcy of one of the *United States*, will not bind a creditor, who is an inhabitant of that State, unless the contract were made there. *Proctor v. Moore*, 1 Mass. Rep. 198.

If the bankrupt before his bankruptcy received money to put out to interest which he neglected to do, he was held to be discharged by his certificate. *Hatten v. Speyer*, 1 Johns. Rep. 37.

If a house be taken for a year before an act of bankruptcy, and the bankrupt continue in possession afterwards, he is not discharged from the *subsequent* rent by his certificate. *Hendricks v. Judah*, 2 Caines' Rep. 25.

So, a surety in a bond, who pays the same after the discharge of the principal, is not barred by such discharge. *Haddens v. Chambers*, 2 Dall. Rep. 236. *S. C.* 1 Yeates' Rep. 529.

A commission of bankruptcy, without a certificate, is no bar to a debt proved under the commission, though the plaintiff have received a dividend. *Lummas v. Fairfield*, 5 Mass. Rep. 248.

When a commission of bankruptcy against the principal, will discharge the bail. *Vide Miller v. et al. Green*, 2 Johns. Cas. 283. *Kane et al. v. I. Graham* *ibid.* 403. *Brel v. Gordon*, 6 Johns. Rep. 126. *Seaman et al. v. Drake*, 1 Caines' Rep. 9.

Where the person of the defendant is taken into custody by proceeding under an *insolvent law of Pennsylvania*, of which the plaintiff had due notice, and the debt

Part II.
Action against
bankrupt.

By another cause, in the same Act of Parliament, it is enacted "that the Act shall not give any *privilege*, benefit, or advantage, to any bankrupt, who shall, for or upon marriage of any his children, have given, advanced, or paid, above the value 100*l.* unless he or she shall prove *by his or her books fairly kept* or otherwise upon *his or her oath, or (being a Quaker) affirmation*, before the major part of the commissioners in such commission named and authorised, that he or she had at the time thereof over and above the value so given, &c. remaining goods, wares, debts, ready money, or other estate, real or personal, sufficient to pay and satisfy unto each and every person to whom he or she was any ways indebted, their full and entire debts; or who hath or shall have lost in any one day the sum or value of 5*l.* or in the whole the sum or value of 100*l.* within space of twelve months next preceding his, her, or their becoming bankrupt, in playing at or with cards, tables, dice, tennis, bowls, billiards, shovel-board; or in or by cock-fighting, horse-racing, dog-matches, or foot-races, or other pastimes, game, or games whatsoever, or in or by having a share or part in the stakes, ventures, or adventures; or in or by betting on the sides or horses of such as do or shall play, act, ride, or run, as aforesaid that within one year before he or she became bankrupt he or she have lost the sum of 100*l.* by one or more contracts for the purchase, sale, refusal, or delivery, of any stock of any company or corporation whatsoever, or any parts or shares of any government or public funds or securities, where every such contract was not to be performed within one week from the time of making such contract, or where the stock or other thing so bought

was contracted there, the Circuit Court discharged him on common bail, and refused to quash the *captias*. *Read v. Chapman*, 1 *Peters' Rep.* 404.

In the case of *British* subjects, a discharge under the bankrupt laws of *England* will protect the person of a bankrupt in this State. *Harris v. Mandeville*, *Rep.* 256. *S. C.* 2 *Yeates' Rep.* 99.

Where the defendant neglected to avail himself of his discharge under the bankrupt law, but allowed judgment to be perfected against him, the Court will, on motion of his bail, order an *exoneretur* on his bail piece. *Mechanics' Hazard*, 9 *Johns. Rep.* 392.

When conveyances made by bankrupts, are void, being made in contemplation of bankruptcy. Vide *Ogden et al. v. Jackson*, 1 *Johns. Rep.* 370. *Phoenix et al.* 5 *Do.* 412. *Sands et al. v. Codriss et al.* 4 *Do.* 536. *Selfridge v. Gill*, *Rep.* 95. *Decoster v. St. Lee Livermore*, *ibid.* 101. *Gilmore v. N. American Co.* 1 *Peters' Rep.* 480. *Rundle v. Murgatroyd's les.* 4 *Dall. Rep.* 304. *v. Castator*, 5 *Binn. Rep.* 109.

Under the Bankrupt Act of *Pennsylvania*, evidence was admissible to show that the certificate of the defendant was *unfairly* obtained. *Pleasants v. Meade* 1 *Dall. Rep.* 380.—*Am. Ed.*

or sold, was not actually transferred or delivered, in pursuance of such contract.”

Ch. XII. s. 2.
Action against
bankrupt.

There appears to be a remarkable difference in the words of these two sections in the same Act of Parliament; by the first, it is expressly enacted, that the certificate shall be sufficient evidence for the defendant, and a verdict shall pass for him, “unless the plaintiff can prove the *certificate* was obtained *unfairly* and by fraud, or unless the plaintiff shall make appear any concealment,” &c. whereas by the other section it is only provided that nothing in the Act shall extend, or give or grant any *privilege, benefit, or advantage*, to a bankrupt falling within the description contained in it. It has been generally supposed, that in the cases mentioned in the 12th section, the certificate is void, and that the defendant may be precluded from his discharge by proving the circumstances at *Nisi Prius*. Several instances have occurred where the nature of the gambling in which the bankrupt has been engaged, has been examined into in a Court of Law, in order to determine whether the certificate was not thereby avoided; and in cases within that section verdicts have passed for the plaintiff. But, perhaps, it may be worth consideration, whether this clause, so differently worded as it is from the other, was meant to extend further than to give authority to the Lord Chancellor and the commissioners to refuse the allowance in the cases mentioned in it. In one instance mentioned in that section, a mode of inquiry is pointed out, quite contrary to the rules of evidence in a Court of Law; if the bankrupt has given more than 100*l.* to either of his children, he may prove by *his books* fairly kept, or on *his oath or affirmation before the commissioners*, that he then had sufficient to pay all his creditors; an advantage which he could never have in an action against himself; and it should seem, that if the Legislature had meant that the misconduct mentioned in that section should have the same effect as a concealment to the value of 10*l.* they would have included those cases in the same section, and not have provided for them by a different clause couched in very different language.*

Vide Co. B.
L. last ed.
464. Lewis
v. Piercy,
1 H. Black. 29.
Bateson v.
Hartink,
4 Esp. Cas. 43.

* This point was made in *Hughes v. Morley*, 1 Barn. & Ald. 22, where, as far as concerns the provision in the case of money lost at play, it was held that this clause of the Act might be taken advantage of on the usual replication at *Nisi Prius*. As to the provision in the case of more than 100*l.* given to a child in marriage, some difficulty seems to have been felt by the Judges; Annott J. and Holrood J. seem to have thought that the whole of this inquiry, viz. the ability of the bankrupt at the time he gave the money, could not be entered into at *Nisi Prius*, but that it was competent for the plaintiff to prove the fact of more than 100*l.* being given

Part II.
Action against
bankrupt.

The Statute 24 Geo. 2, c. 57, s. 9, has made another provision in aid of the 7th section of the former Act of Parliament, in enacting, that where any person shall swear to any fictitious debt, and shall sign the certificate in respect thereof, that in such case, unless the bankrupt shall before such time as the commissioners shall have signed the certificate, by writing by him signed and delivered to one or more of the commissioners assignees, disclose the fraud and object to the reality of the debt, such certificate shall *be null and void to all intents and purposes*; and such bankrupt shall not in such case be entitled to be discharged from his debts, or to have or receive any of the *benefits or allowances* given by the former Act. In a case of this kind the plaintiff must be prepared to prove that the certificate was fraudulent, and the bankrupt must shew that he gave notice required by the Act. Lord KENYON held that even a petitioning creditor's debt might be impeached at *Nisi Prius* for the purposes of this clause.

Bateson v.
Hartsink,
4 Esp. Cas. 43.

49 Geo. 3,
c. 121.

Read v.
Sowerby,
3 M. & S. 78.

Another case, in which the effect of the certificate may be partially avoided by the creditor, is where a commission is taken against a person who has been a bankrupt, or compounded with his creditors, or discharged as an insolvent debtor, and has since paid, or his estate is not in a condition to pay, fifteen shillings in the pound under the second commission. In this case the future effects continue liable, and even persons who had signed their certificate might, before the late Act of Parliament, maintain actions against him: but since that Statute it seems that the mere proving a debt under the second commission is an election within its provision, which deprives the creditor of his remedy by action in the cases excepted by the Statute 5 Geo. 2. It is clearly holden that it does so in cases where the bankrupt having been in that situation, or compounded with his creditors before, afterwards paid the full amount of his debts.

If the plaintiff produce the first commission and the proceedings under it,* and prove that the defendant submitted

then, and that the defendant might avoid the effect of that evidence by shewing the amount of his property before the commissioners; neither of the Judges thought how the verdict is to be taken in the mean time.

* In *Bateson v. Hartsink*, cited above, the plaintiff, in order to shew that the defendant had concealed to the value of 10*l.* served the solicitor under the Statute with a *subpœna duces tecum* to produce the proceedings under the commission. But Lord KENYON is reported to have said, that he was not only not bound to produce them, but that it would be criminal in him to do it. They were not

that will be sufficient without further evidence. After which it should seem that it will be incumbent on the defendant to prove that his estate is sufficient to pay fifteen shillings in the pound under the second commission. But it is clearly settled that if the plaintiff give any evidence to shew a probability that the estate will not produce that sum, he may maintain his action at any time, and is not obliged to wait until the expiration of the time allowed for making the dividend.

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Action against
bankrupt.

Jelfs v.
Ballard, 1 B.
& P. 467.

The Statute in this case giving judgment against the future effects of the bankrupt only, there seems to be some difficulty in taking such judgment, merely on the *similiter* being found for the plaintiff. We have before seen it laid down as a general rule, that all matter which is to avoid the certificate may be given in evidence on such a replication, and such, I believe, has been the practice in these cases. The only case that I am aware of, in which an attempt was made to introduce special pleading, failed, because the plaintiff prayed judgment generally, instead of against the future effects only; but the Court also held the replication to be bad, because it concluded with a verification when the plea concluded to the country, thereby intimating that the *similiter* only should have been replied.

Wilson v.
Kemp, 2 M.
& S. 549.

The before-mentioned cases make the certificate void, or restrain the extent of its operation *ab initio*, but the bankrupt may by his own voluntary act also deprive himself of the benefit of it; and, therefore, if it be proved that he promised to pay the debt after he had obtained his certificate, though no new consideration is shewn, such promise will bind him, and may be given in evidence on a count founded on the original consideration.(1) But in a case(2) where the promise was conditional to pay when he should be able, it was ruled by GOULD and HEATH, Justices, contrary to the opinion of Lord LOUGHBOROUGH, C. J. that evidence must be given of his ability, though probably his general appearance and credit would be deemed sufficient to establish this fact.

(1) Williams
v. Dyde,
Peake's N. P.
68.

(2) Vide Bes-
ford v. Sand-
ers, 2 H. Bl.
116.

As to the persons who are competent to give evidence in cases of this nature, *vide ante*, Part I. p. 242.

pers, but those of his clients, the assignees of the bankrupt's estate. If the plaintiff wanted them he should apply to the Lord Chancellor to have them enrolled, and then use a copy as evidence. But in a subsequent case Lord ELLENBOROUGH said that he considered the production as a public duty. *Pearson v. Fletcher*, 5 Esp. 90; and see *Corson v. Dubois*, 1 Holt, 239, and *Cohen v. Templar*, 2 Starkie, 260, *accord*.

CHAP. XIII.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST AN EXECUTOR
OR ADMINISTRATOR.

SECTION I.

In actions by an executor or administrator.

Part. II.
Action by
executor, &c.

WHEN an action is brought by an executor or administrator on a cause of action arising in the life-time of the deceased, and the defendant pleads only the general issue thereto, it is sufficient for the plaintiff to prove the same facts as must have been adduced in evidence by the testator or intestate, had the action been brought by him. (a) The plaintiff need not on this issue

Actions by and against executors, &c.

(a) An action of replevin survives the death of the plaintiff but not of the defendant. *Pitts exr. v. Hale*, 3 Mass. Rep. 321. *Mellen et al. v. Baldwin*, 4 De. 480.

Trespass will lie in favour of an administrator for goods taken and converted in the life-time of the intestate. *Kirby v. Clark*, 1 Root's Rep. 389.

So an action of trespass will lie in favour of the administrator for entering upon lands and burning the mills of the intestate during his life-time. *Griswold v. Brown*, 1 Day's Rep. 180.

An action of debt will lie against an administrator on a judgment recovered by the intestate in his life-time. *Wooster v. Bishop*, 2 Root's Rep. 230.

An action on the case, for expenses incurred, in defending against a groundless suit, cannot be maintained by the executor of such defendant. *Deming v. Taylor*, 2 Day's Rep. 285.

In New York, executors may have trespass for wasting and destroying, as well as taking and carrying away the goods of the testator. *Snider et al. v. Croy*, 2 Johns. Rep. 227.

Actions arising from tort or misfeasance, do not survive against executors. *Franklin v. Low et al.* 1 Johns. Rep. 396.

An administrator is not liable for a personal tort or misfeasance of the intestate. *McEvers v. Pitkin*, 1 Root's Rep. 216.

In South Carolina, an action of trespass or tort under the English Statute will survive to a testator's executors; and though it does not survive against them, yet by waving the tort and going for the value of the thing, assumpsit for money had and received will survive as well for as against executors. *Middletown's exrs. v. Robinson*, 1 Bay's Rep. 58.

In Maryland, an executor cannot bring an action for overflowing lands of the testator in his life-time. *McLaughlin v. Dorsey*, 1 H. & McHen. Rep. 224.

An action for a forfeiture, incurred under a penal act, being brought by the plain-

produce the probate or letters of administration to the jury, (1) Ch. XIII. s. 1. nor will the defendant be permitted to shew that they do not in fact exist, or that they are void for want of a proper stamp. (2) To entitle himself to do this, it is necessary for the defendant to traverse their existence by the plea of *ne unques executor*, or *ne unques administrator*, and then the very production of the probate or letters of administration is sufficient evidence on the part of the plaintiff; and they can only be avoided by the defendant for the causes which have been already stated. (3)(b)

Action by executor, &c.

(1) *Mearnsfield v. Marsh*, 2 Ld. Raym. 824.

(2) *Thynne v. Protheroe*, 2 M. & S. 553. 1 Sid. 350.

(3) *Vide ante*. 123.

tiff, who dies pending suit, will not survive to his administrator. *Esti' exrs. v. Lenox*, Rep. in Co. of Conf. 72.

Debt will not lie against the administrators of a Sheriff for an escape in the lifetime of their testator or intestate. *Martin et al. v. Bradley*, 1 Cuines' Rep. 124. Et vide *Kuin et al. v. Ostrander*, 3 Johns. Rep. 159.

An action will not lie against the administrators of a post-master for money feloniously taken by one of his clerks out of a letter delivered at the post-office. *Franklin v. Low et al.* 1 Johns. Rep. 396.

A foreign attachment will not lie against executors. *M'Combe's exrs. v. Dunch et al.* 2 Dall. Rep. 73. *Pringle v. Black's exrs.* *ibid.* 97.

An executor is not liable in foreign attachment for a legacy in his hands. *Winchell v. Allen*, 1 Con. Rep. 385.

An action of detinue will not lie against the administrators for a detention of slaves by the intestate in his life time. *Walker v. Hawkins*, 1 Hayw. Rep. 398.

But an action of *indebitatus assumpsit* will lie against executors for the mesne profits of lands held by their testator during his life time, unless the testator had no notice of the adverse title, or was in possession under a title, or such a title as he was mistaken in, or there was default or laches in the plaintiff. *Haldane et al. v. Duche's exrs.* 2 Dall. Rep. 176. S. C. 1 Yeates' Rep. 121.

An action of covenant will lie against executors though they be not specially bound in the covenant. *Harrison v. Sampson*, 2 Wash. Rep. 200.

An action of trover will lie against executors for a conversion in the life-time of their testator. *Decrow v. Mone's exr.* 1 Hayw. Rep. 21. *Clark v. Kenan et al.* *ibid.* 308. *Avery v. Moore's exr.* *ibid.* 362. *M'Kinnis et al. v. Oliphant's exrs.* *ibid.* 4. *Towle admx. v. Lovet*, 6 Mass. Rep. 394.

On the same principle, an action on the case for seducing away the plaintiff's slave from his service by the testator, will lie against his executors. *Cutler v. Brown*, 2 Hayw. Rep. 182.

In an action of trover the writ will abate by the death of the defendant, and his executor will not be compelled to come in and defend. *Barnard v. Harrington*, 3 Mass. Rep. 228.—AM. ED.

(b) In an action of *assumpsit* brought by executors under the plea of *non-assumpsit* and *payment*, the plaintiffs were not bound to produce their letters testamentary. *M'Kimm et al. v. Riddle* 2 Dall. Rep. 100. Et vide *Axers v. Musseleman*, 2 Browne's Rep. 115.

In actions of debt, or on the case, against an executor, for a debt due from the testator, the plea of *non est factum*, or *non assumpsit*, is an admission of a will, of which the defendant is executor: *secus*, where the action is for a demand, for which the testator was not liable, as for a legacy. *Hantz v. Sealy*, 6 Binn. Rep. 405

So in an action of detinue. *Hughes v. Clayton*, 3 Call's Rep. 554.

Part II.
Action by
executor, &c.

Mearsfield
v. Marsh,
ubi sup.

Vide post, c.
14, s. 4.

General issue.

(1) Hunt v.
Stevens,
3 Taunt, 113.
Ante, 100.

Statute of
Limitations.

(2) Sarel v.
Wine, 3 East,
409.

But when the plaintiff sues for a wrong done to himself after his testator's or intestate's death, as in trover for goods converted after that time ; or ejectment for lands in which the deceased had a term ; the plaintiff must (unless he has himself had such an actual possession as is *prima facie* evidence of title) not only give evidence of the title of the deceased, but also produce the probate or letters of administration, or the Book of the Ecclesiastical Court wherein they are entered ; for without this evidence he does not shew that he is entitled to the thing in dispute. (c) The general issue in this case puts in issue every fact necessary to constitute the plaintiff's title ; and if on production the letters of administration appear to be void for want of a sufficient stamp, or on account of their being *bona notabilia*, the defendant will succeed on that plea. (1)

If the defendant plead the Statute of Limitations, and he has in fact acknowledged the debt within six years, but after the death of the testator, the plaintiff cannot give this in evidence, unless the declaration contain counts on a promise to himself. (2) (d)

Letters of administration need not remain in Court, and are not demandable after issue is joined. *Berry's adms. v. Pullam*, 1 *Hayw. Rep.* 16.

So when an administrator declares as such he makes a profert of his letters of administration, but if the defendant do not crave *oyer* of them, &c. and plead in chief, then the plaintiff is not bound on the trial to produce them. — *Exrs. v. Oldham*, *ibid.* 165.—*AM. ED.*

(c) Where an executor declares on *his own* possession, and not as executor, he does not make a profert of his letters testamentary in his declaration ; the defendant cannot crave *oyer* of them, and therefore on the trial the plaintiff in deducing his right must shew the letters testamentary. — *Exrs. v. Oldham*, 1 *Hayw. Rep.* 165.

Where an executor sues for a trespass or conversion after the death of the testator, he need not name himself as executor. *Frink v. Luyten*, 2 *Bay's Rep.* 168. Et vide *Martin et al. v. Smith*, 5 *Binn. Rep.* 16. *Langdon et al. adms. v. Potter*, 11 *Mass. Rep.* 313.

In debt by an administrator, upon a judgment recovered by him in that capacity, he need not declare as administrator. *Talmadge v. Chapel et al.* 16 *D. 71.*—*AM. ED.*

(d) A new promise by an executor or administrator, within six years, taken the case out of the Statute of Limitations, as well as in an action against an administrator *de bonis non*, as against the original executor or administrator, who made the promise. *Emerson v. Thomson et al.* 16 *Mass. Rep.* 429.

On a trial of an issue on the *assumpsit* of the testator, within five years, an *assumpsit* of his executor cannot be given in evidence to avoid the Statute of Limitations. *Fisher v. Duncan*, 1 *H. & Munf. Rep.* 563.

So, on the trial of an issue upon the assumption of the testator, an *assumpsit* of his

SECTION II.

In actions against an executor, &c.

THE general issue in this case also merely disputes the cause of action against the deceased, and not the character or liability of the defendant.^(e) If, therefore, the defendant contend that he is not chargeable as executor, or that he has fully administered the goods of the testator, he must plead *ne unques executor*, or *plene administravit*.

Chap. XIII.
Sect. 2.
Action against
executor.
General issue.

On the first of these pleas the plaintiff must prove either that the defendant has been appointed executor and proved the will, or else that he has made himself liable as such by intermeddling with the goods of the deceased. To prove the first fact, an examined copy of the entry in the proper book of the Ecclesiastical Court of Probate having been granted to him,⁽¹⁾ is sufficient without any notice to him to produce the probate.*^(f) But the

(1) *Davies v. Williams*, 13 East, 232.
Vide *Garret v. Lister*, 1 Lev. 25.
Peaslee's Case, 101.

executor cannot be given in evidence to establish the demand. *Quarles' admr. v. Littlepage*, 2 Do. 401.

So in *North Carolina*. *Wilkins v. Murphy*, 2 Hayw. Rep. 232.

In an action against an executor the plaintiff may state that the testator being indebted, &c. the executor after the death of the testator in consideration, &c. promised to pay in order to avoid the Statute of Limitations. *Whitaker v. Whitaker*, 6 Johns. Rep. 112.

Et vide *Henderson v. Foote*, 3 Call's Rep. 248.—AM. EN.

^(e) An executor is not liable for the debts of the intestate. *Stoddard v. Bird*, 4 Krb. Rep. 68.

An executor's right is confined to the goods and chattels of the intestate, unless the real estate be wanted to pay the debts, or for some purpose expressed in the will. *Hubbel v. Pratt*, 1 Root's Rep. 519.

Whether, in *Massachusetts*, an executor may give insolvency of his intestate, in evidence under the general issue by the Act of Assembly of that State? *Foster v. Abbott*, 1 Mass. Rep. 234.—AM. EN.

* In *Elden v. Keddel*, 3 East, 187, it was determined, that even for the party claiming under the letters of administration, the original books of acts directing letters of administration to be granted with the surrogate's fiat for the same, was sufficient evidence of title without producing the letters of administration; and in *Gorton v. Dyson*, 1 B. & B. 212, the Court of C. P. held, that the production of the original will (by an officer from the Spiritual Court,) on which there was an endorsement of probate having been granted to the defendant, was evidence against him of the contents of the will.

^(f) To an action against an administrator, it is a good plea in bar, that, since the commencement of the action against him, he has been removed by due course of law from his administration. *Jewett v. Jewett*, 5 Mass. Rep. 275.

Part. II.
Ne unques
executor.

Vide 2 T.
Rep. 97. 597.

(1) Edwards
v. Harbin,
2 T. Rep.
587.

(2) Padget v.
Priest,
2 T. Rep. 97.

Plene ad-
ministravit.

more usual evidence on this issue is the circumstance of the defendant's intermeddling with the goods; and any intermeddling by a stranger, however slight, makes him executor *de son tort*, or, in other words, is evidence against him that he sustains the character of executor, and estops him from saying to the contrary. Thus, if a man take a fraudulent bill of sale of the goods of his debtor, and having suffered him to continue in possession, after his death possesses himself of the goods; (1) or if *A.* desire *B.* to sell the goods of the deceased, who does so and pays *A.* the money, both the creditor and *A.* in these cases make themselves executors *de son tort*, and may be sued generally as executors by the creditors of the deceased. (2)

Supposing, therefore, the defendant properly sued as executor, the plaintiff on proving his debt will be entitled to recover, unless the defendant has pleaded *plene administravit*. (g) This plea is either general, or special as to all the effects except goods to a certain amount, which are chargeable with debts of a higher nature, contracted by the testator in his life-time, or with judgments recovered by other creditors against the defendant as his executor. (h)

In the first of these cases, viz. the general plea of *plene administravit*, the plaintiff may either reply that the defendant had goods at the time of exhibiting the bill, or state the day when the writ was actually sued out, and served on the defendant,

Intermeddling with the estate real or personal, conveyed by a fraudulent bill of sale of a deceased person, will not make a man an executor *de son tort*. *King v. Lyman*, 1 Root's Rep. 104.

The taking out of letters of administration, after the defendant has intermeddled with the estate, will not purge the wrong. *Green v. Dewit*, *ibid.* 183.

As to an executor *de son tort*, vide *Osborne v. Moss*, 7 Mass. Rep. 161. *Ratton et al. v. Overacker*, 8 Johns. Rep. 97. *Hastler v. Scull*, 2 Hayw. Rep. 179.

(g) Under the laws of *Connecticut*, the plea of *plene administravit* is not admissible. *Olcott v. Graham*, *Kirb. Rep.* 246.

Plene administravit, is a good plea to a *scire facias* against an administrator, founded on a judgment obtained against the intestate. *Tanner v. Freeland*, 1 H. & M. Hem Rep. 34.

An executor must, at his peril, take notice of a judgment against his testator, in what Court soever it may be rendered; and if he exhaust the assets by paying debts of inferior dignity, he must satisfy such debts *de bonis propriis*. *Nimmo v. The Commonwealth*, 4 H. & Munf. Rep. 57.—AM. ED.

(h) An executor or administrator ought to be permitted to amend his plea by pleading *plene administravit*, at any time before the trial: Provided the Court be satisfied it is not for delay. *Christopher v. Anthony*, 1 H. & Munf. Rep. 28.—AM. ED.

and that the defendant had goods unadministered at that day. Ch. XIII. s. 2. The only difference in the effect of these two replications is, that on the first the plaintiff must prove that the defendant had goods unadministered at the day whereon the action appears by the record to have been commenced, and must allow all payments of equal degree with his own debt made previous to that day: whereas by the other he entitles himself to charge the defendant with all goods which the defendant had when the writ was served.

In either case the *onus* lies on the plaintiff, who must prove that the defendant had assets at the time alleged. (i) To make out this fact he must shew that the defendant possessed himself of goods, or received monies belonging to the testator, or that he might have so done without gross negligence on his part; barely proving an admission by the defendant that the debt was a just one, and should be paid as soon as he could, (1) (1) *Headley v. Russell*, 12 East, 232. or a submission of the amount of the debt to arbitration; (2) (k) or the payment of interest on a bond, (3) will not be sufficient to charge him with assets. In many cases it becomes necessary for the plaintiff to cite the defendant, in the Ecclesiastical Court to exhibit an inventory, or to file a bill in equity against

Pl. ne
administravit.

Corbet's Case,
1 Leon. 312.

(2) *Pearson v. Henry*, 5 T. Rep. 6.

(3) *Cleverly v. Brett*, there cited.

(i) In an action against executors for a *legacy*, the plaintiff must aver and prove that the executor, at the time of bringing the action, had sufficient assets to pay the debts and legacies. *Dewitt et ux. v. Schoonmaker et al.* 2 Johns. Rep. 243.

But in an action against an executor for a *debt* due from intestate on the plea of *plene administravit*, the *onus probandi* lies on the defendant. *Platt v. Robins et al.* 1 Johns. Cas. 276.

So in such a case it is not necessary for the plaintiff to prove assets to recover. *Slade v. Morgan*, 1 Hall's Am. Law Journ. 334.

Still the defendant-executor under this plea need not prove each debt to be due that he paid; when he shews the payment, the plaintiff may shew, if he can, that the debt was not due. *Brown v. Lone*, 2 Hayw. Rep. 159.

So, under this plea, the administrator need not produce the subscribing witness to a note or bond given to him by the intestate, but may prove it by other means. *Woolford v. Wright's adms.* *ibid.* 230.

An administration account settled according to the laws of the State, are *prima facie* evidence of their own correctness, and it lies on the opposite side to falsify them. *Atwell's adms. v. Milton*, 4 H. & Munf. Rep. 252.

In an action for a distributive share of an estate, the settlement of the defendant's administration account is not conclusive. *Kohr et ux. v. Fedderhaff et al.* 4 Serg. & R. Rep. 248.

A settlement of accounts by executors in the Orphans' Court, made after the commencement of an action against them for a legacy, is not conclusive upon the plaintiffs in such action. *Miller et al. v. Young et al.* 2 Serg. & R. Rep. 518.

Quere, Whether it would have been if made before the commencement of the action. *ibid.* Et vide *Sutton v. Conolly*, 1 Browne's Rep. App. lxiv.—AM. ED.

(k) *Hoare v. Muloy*, 2 Yeates' Rep. 161. *Schoonmaker v. Roove et al.* 17 Johns. Rep. 301.—AM. ED.

Part. II.
Plene
administravit.

(1) Smith
v. Davis,
B. N. P. 140.

(2) Wilborne
v. Dewsbury,
Bul. N. P.
140.

(3) Ibid.

(4) Worral
v. Hand,
Peak. Cas. 74.

(5) Sawyer
v. Mercer,
1 T. Rep.
690.

him for a discovery, before he can proceed to trial on this issue ; and the inventory so exhibited, or the answer put in to the plaintiff's bill, will be *prima facie* evidence against the defendant to the amount of all goods or debts mentioned in it, and put it on him to shew that the latter were desperate.(1)(1)* We have before seen the method of proving an answer. To establish an inventory the defendant's signature to it should be proved ; and if the goods mentioned in it are undervalued, the plaintiff may give evidence of that fact,(2) or, I conceive, the fact of the defendant having other goods not mentioned in it.

As to what effects shall be deemed assets, it has been holden that for a lease(3) which the defendant has not sold, he shall be charged to the extent of its value ; and if the defendant has actually made money of a thing which came to him from the testator, though it was quite uncertain whether any value could be attached to it or not, he shall be chargeable to the creditor to the amount of the money so made : as where an executor sold the goodwill of the deceased's trade, Lord Kenyon held it to be assets in his hands.(4)

The defendant being thus charged with assets, must prove, that before the day mentioned in the replication, he had applied them in satisfaction of the testator's debts of equal degree with that of the plaintiff. In general, no debt of a degree inferior to it will be allowed as an administration of the effects, unless paid before notice of the plaintiff's debt ; and where a judgment recovered on a simple contract debt is pleaded to an action on a bond, it must be stated to have been recovered before the defendant had notice of the bond.(5) But the case of a judgment recovered against the testator, which is not docketted, is an exception to this general rule, the Stat. 4 & 5 W. & M. c. 20, having required that step to make the judgment of more weight than a simple contract debt against an executor or administra-

(1) The plea of *plene administravit* is to be determined by reference to the inventory only. *Tappen v. Kain et al.* 12 Johns. Rep. 120.—Am. Ed.

* It is said in *Shelley's Case*, Salk. 296, that all *separate* debts mentioned in the inventory shall be counted assets, unless a *demand and refusal* be proved. This expression I conceive must mean, that the executor has really attempted *bona fide* to obtain payment, and not made a mere formal demand on the debtor ; for in *Wentw. Off. Ex.* 160, it is said, that "if the executor be of secret assent to the embezzlement of goods, whereof even the forbearance to sue for the recovery of them, or the value in damage, if it be known where they or the embezzlers be, is a shrewd evidence or proof ; then shall the executor be adjudged an haver of them, and so stand charged as having them, for *pro possessore habetur, quia dolo destitui possidere*. See also *Lawson v. Copeland*, 2 Bro. C. Cas. 156.

(1) Vide Bul.
N. P. 143.

On the plea
of specialty
debts out-
standing.

(2) Steele v.
Rook, 1 B.
& P. 307.

deceased, and if it be of a degree equal to that of the plaintiff's, retain to the amount; but an executor *de son tort* is not permitted so to retain.(o) It has been said that to prevent a retainer, the plaintiff ought to shew him to be executor *de son tort* by proof of the will, and that other persons are executors:(1) but it should rather seem that the *onus* in this case ought to lie on the defendant to shew himself the legal representative of the deceased, than on the plaintiff to shew the contrary; for the plaintiff knows nothing more of his title than finding him in possession of the effects. Besides, in most cases where a person is sued as executor *de son tort*, no will whatever has been made, and in cases where the defendant pleads the retainer specially, it is always usual for him to state the letters of administration, or probate, and make profert of them.(p)

On the plea of judgments against the testator, or specialty debts outstanding, and *plene administravit preter*, the plaintiff may, in the case of the judgment, either traverse its existence, or reply that it was not duly docketted; in which case, as we have before seen, it has only the effect of a simple contract debt.(2) The bonds he likewise may deny; or he may in either case reply, that there are sufficient assets to satisfy them, and also to pay his debt; or that the bonds are conditioned for the payment of a less sum, which the creditor is willing to take, but that the defendant keeps them on foot by fraud to cover the assets, and that he had sufficient to satisfy the plaintiff's debt after payment of what was due.(q)

(o) A retainer by an administrator, may be either specially pleaded or given in evidence, under the plea of *plene administravit*. *Evans v. Norris's adm.* 1 *Hayes. Rep.* 411.

If the administrator of the obligor be the executor of the obligee, and has assets in the former capacity, it is payment. *Ridley v. Thorpe*, 2 *Do.* 343.—*AM. Ed.*

(p) If an executor *de son tort*, take out letter of administration, it makes legal all acts which were before tortious. *Ratoon v. Overacker*, 8 *Johns. Rep.* 97.—*AM. Ed.*

(q) The Court will decree an off-set against an administrator of an insolvent estate, (though the claim have not been exhibited and allowed according to law) on the ground of fraud. *Rose v. Clarke*, 1 *Root's Rep.* 239.

If an administrator fraudulently purchase the estate of the intestate, the sale is void against the creditors and heirs. *Shelden v. Woodbridge*, 2 *Root's Rep.* 473.

An administrator can not purchase land of his intestate, sold by order of the Orphans' Court. *Rham v. North*, 2 *Yeates' Rep.* 117. Et vide *Guier v. Kelly*, 2 *Binn. Rep.* 294. *Wallace et al. Duffield et al.* 2 *Serg. & R. Rep.* 521.

A purchase of land by an executor, which had been sold by him agreeably to the will of his testator, is valid, if it appear that his conduct in the sale was fair and correct. *Fuqua's exr. v. Young*, 4 *H. & Munf. Rep.* 430.

The Court will not grant a continuance to an administrator, defendant, for the

If the judgment is denied by the replication, it of course forms an issue of *nul tiel record* for the Court. If the bonds are so denied, the defendant must prove them by the subscribing witness, and if the defendant has pleaded several, and fail in the proof of any one, the whole plea is bad.⁽¹⁾

Ch. XIII. s. 2.
On the plea of
specialty debts
outstanding.

(1) Salk 312.

On the second kind of replication, viz. the sufficiency of the assets, the evidence will be the same as on the general plea of *plene administravit*: But then, if the day of payment were passed, and the bond forfeited at the testator's death, the plaintiff must prove assets over and above sufficient to satisfy the full amount of the *penalty*, even though the conditions are set out in the plea.⁽²⁾ In this case, therefore, it is always advisable for the plaintiff to reply *per fraudem*, and very little matter is sufficient to prove the first part of this replication. The circumstance of the creditor being willing to take a less sum, and the defendant having assets to pay it, is sufficient;⁽³⁾ and then, whether there were more assets than were wanting to satisfy the debts really due, becomes the true question in the cause; as to which it is needless to repeat what has been before said as to the other replication.

(2) Bank of
England v.
Morris, 2
Stra. 1082.

(3) Parker v.
Atfield, Salk.
311.

When the defendant pleads judgments recovered against himself, the plaintiff may make similar replications. If the existence of the judgment be denied, it will be by a replication of *nul tiel record*, and of course the trial will be by the Court, and not by the jury. But if the plaintiff admit the fact of the judgment, and state that it was recovered by fraud, and that no debt whatever was due, it will then be incumbent on the defendant to prove to a jury the consideration of the judgment.⁽⁴⁾ When actual fraud is charged by the replication, and not merely the circumstance of the penalty being stated as the debt, the plaintiff does not reply to that part of the plea which says that the defendant has no assets *ultra*.⁽⁵⁾

(4) Trethewy
v. Askland,
2 Saund. 48

(5) Vide 1
Stra. 410.

There is another action against an executor or administrator which requires a separate consideration; viz. that suggesting a *devastavit*. This action can only be maintained after a judgment recovered against the defendant *de bonis testatoris*; and as it charges him with wasting the goods, or applying them to

purpose of pleading insolvency, who has been grossly negligent in bringing his administration account to a close. *Foster v. Abbott adm.* 1 Mass. Rep. 234.

An administrator wilfully neglecting to oppose illegal claims against an insolvent estate, is liable to an action by the injured party. *Parsons v. Mills*, 2 Do. 80. Et vide *Douglass v. Satterlee et al.* 11 Johns. Rep. 16.—A.M. Ed.

Part II.
Plene
administravit.

(1) Vide Bul.
N. P. 143.

On the plea
of specialty
debts out-
standing.

(2) Steele v.
Rook, 1 B.
& P. 307.

deceased, and if it be of a degree equal to that of the plaintiff retain to the amount; but an executor *de son tort* is not permitted so to retain.(o) It has been said that to prevent a retainer the plaintiff ought to shew him to be executor *de son tort* by proof of the will, and that other persons are executors:(1) but should rather seem that the *onus* in this case ought to lie on the defendant to shew himself the legal representative of the deceased, than on the plaintiff to shew the contrary; for the plaintiff knows nothing more of his title than finding him in possession of the effects. Besides, in most cases where a person sued as executor *de son tort*, no will whatever has been made, and in cases where the defendant pleads the retainer special, it is always usual for him to state the letters of administration or probate, and make proof of them.(p)

On the plea of judgments against the testator, or specialty debts outstanding, and *plene administravit preter*, the plaintiff may, in the case of the judgment, either traverse its existence or reply that it was not duly docketed; in which case, as we have before seen, it has only the effect of a simple contest of the debt.(2) The bonds he likewise may deny; or he may in the case reply, that there are sufficient assets to satisfy them, also to pay his debt; or that the bonds are conditioned for payment of a less sum, which the creditor is willing to take, that the defendant keeps them on foot by fraud to cover the assets, and that he had sufficient to satisfy the plaintiff's demand for payment of what was due.(q)

(o) A retainer by an administrator, may be either specially pleaded or given in evidence, under the plea of *plene administravit*. *Evans v. Norris's adms.* 1 Rep. 411.

If the administrator of the obligor be the executor of the obligee, and has in the former capacity, it is payment. *Ridley v. Thorpe*, 2 Do. 343.—AM. E.

(p) If an executor *de son tort*, take out letters of administration, it makes all acts which were before tortious. *Ratoon v. Overacker*, 8 Johns. Rep. AM. Ed.

(q) The Court will decree an off-set against an administrator of an insolvent estate, (though the claim have not been exhibited and allowed according to the ground of fraud. *Rose v. Clarke*, 1 Root's Rep. 229.

If an administrator fraudulently purchase the estate of the intestate, the void against the creditors and heirs. *Shelden v. Woodbridge*, 2 Root's Rep.

An administrator can not purchase land of his intestate, sold by order of thephans' Court. *Rham v. North*, 2 Yeates' Rep. 117. Et vide *Guier v. Kelly*, 5 Rep. 294. *Wallace et al. Duffield et al.* 2 Serg. & R. Rep. 521.

A purchase of land by an executor, which had been sold by him agreeably to his testator, is valid, if it appear that his conduct in the sale was fair and rect. *Fuqua's exr. v. Young*, 4 H. & Munf. Rep. 430.

The Court will not grant a continuance to an administrator, defendant,

If the judgment is denied by the replication, it of course forms an issue of *nul tiel record* for the Court. If the bonds are so denied, the defendant must prove them by the subscribing witness, and if the defendant has pleaded several, and fail in the proof of any one, the whole plea is bad.⁽¹⁾

Ch. XIII. s. 2.
On the plea of specially debts outstanding.

(1) Salk 312.

On the second kind of replication, viz. the sufficiency of the assets, the evidence will be the same as on the general plea of *plene administravit*: But then, if the day of payment were passed, and the bond forfeited at the testator's death, the plaintiff must prove assets over and above sufficient to satisfy the full amount of the *penalty*, even though the conditions are set out in the plea.⁽²⁾ In this case, therefore, it is always advisable for the plaintiff to reply *per fraudem*, and very little matter is sufficient to prove the first part of this replication. The circumstance of the creditor being willing to take a less sum, and the defendant having assets to pay it, is sufficient;⁽³⁾ and then, whether there were more assets than were wanting to satisfy the debts really due, becomes the true question in the cause; as to which it is needless to repeat what has been before said as to the other replication.

(2) Bank of England v. Morris, 2 Stra. 1082.

(3) Parker v. Atfield, Salk. 311.

When the defendant pleads judgments recovered against himself, the plaintiff may make similar replications. If the existence of the judgment be denied, it will be by a replication of *nul tiel record*, and of course the trial will be by the Court, and not by the jury. But if the plaintiff admit the fact of the judgment, and state that it was recovered by fraud, and that no debt whatever was due, it will then be incumbent on the defendant to prove to a jury the consideration of the judgment.⁽⁴⁾ When actual fraud is charged by the replication, and not merely the circumstance of the penalty being stated as the debt, the plaintiff does not reply to that part of the plea which says that the defendant has no assets *ultra*.⁽⁵⁾

(4) Trethewy v. Ackland, 2 Saund. 48

(5) Vide 1 Stra. 410.

There is another action against an executor or administrator which requires a separate consideration; viz. that suggesting a *devastavit*. This action can only be maintained after a judgment recovered against the defendant *de bonis testatoris*; and as it charges him with wasting the goods, or applying them to

purpose of pleading insolvency, who has been grossly negligent in bringing his administration account to a close. *Foster v. Abbott adm.* 1 Mass. Rep. 234.

An administrator wilfully neglecting to oppose illegal claims against an insolvent estate, is liable to an action by the injured party. *Parsons v. Mills*, 2 Do. 80. Et vide *Douglas v. Satterlee et al.* 11 Johns. Rep. 16.—AM. ED.

CHAP. XIV.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST HEIRS AND DEVISEES.

Part II.
By and against
heirs and
devisees.

HEIRS or devisees may be plaintiff's upon the covenant made by their ancestor or devisor; or may be sued upon his bond, &c. (a) and they have frequently occasion to be parties in actions of trespass, replevin, and ejectment, when their right to the land itself comes in question.

In actions of covenant, debt, trespass, and replevin, the pleadings necessarily point out the fact to be proved; but, in the action of ejectment, every thing necessary to make out the title of the parties must be given in evidence.

SECTION I.

Of proof of title by an heir.

Sect. 1.
Proof by heir.

THIS action, therefore, requiring the most evidence, we will suppose the case of a person bringing an ejectment as heir-at-law to his first cousin, *ex parte paterna*, who died seised of an estate; the father of the claimant having early in life offended his family, and being discarded from it, and therefore the lessor of the plaintiff put to the most strict proof of his pedigree.

The first fact necessary to be shewn on such an occasion is, that the person from whom he claims was seized of the estate. Of which fact the actual possession of it, or receipt of rent from

(1) *Bal. N. P.* the person in possession, is *prima facie* evidence; (1)* but if
 103.

(a) Real covenants, such as run with the land, only go to the heir. *Hamilton et al. v. Wilson, 4 Johns. Rep. 72.—Am. Ed.*

* I have, in the text, put the case of a cousin *ex parte paterna*. If he claim as heir, *ex parte paterna*, it will be necessary for him to prove, in addition to what is required in the other case, that the mother of the person from whom he claims was seized of the land, and that it descended to the person last seized from her; for, until the contrary is shewn, the law always presumes that it descended from some

there also be evidence of possession in another, to rebut this presumption, the party should go further; for where it was proved that *A.* was in possession of land during his life time, and that after his death his daughter continued in possession forty years, while a son and heir lived near and knew the fact, such subsequent possession, contrary to the course of descent, was held to raise a stronger presumption that the father had only an estate for life, than his possession did of a fee, and this even in a writ of right.⁽¹⁾ The lessor of the plaintiff should next shew that his father and uncle were descended from the same common ancestors, (his grandfather and grandmother,) which fact may be proved by the register of their marriage, and that of the baptism of their children.

Ch. XIV. s. 1.
Proof by heir.

(1) *Jayne v. Price*, 5 Taunt. 326.

Where families have been long settled in the same place, and marriages have been celebrated with the consent of relations, this evidence will be easily obtained; but, in the case of clandestine marriages, or those of families which have lately risen from obscurity, it may be difficult to prove the actual celebration of a marriage at any distant period; therefore the general reputation of the family, that *A.* married *B.* or proof that they always passed as man and wife, will be sufficient, though no register can be found, nor any person is living who was present at the marriage.⁽²⁾ The birth of children may also be proved by the entry of their names in the family bible, &c. and where families have occasion to move from place to place, especially in great cities, it is very desirable that some such private register should be preserved, not only to be used as evidence itself, but also to refer to that which is more authentic. A father who will be at the trouble of registering the birth of each child in his bible, and also of mentioning the place at which such child was baptised, may prevent much litigation amongst his posterity. The time of the birth is in all cases necessary to be noted by the parent, for as to this the public register proves nothing, and it often becomes material to ascertain it.⁽³⁾

(2) *Vide ante*, 22, &c.

(3) *Per Lord Mansfield*, Cowp. 95.

Proceeding in the chain of evidence, it is next necessary to

remote unknown ancestor, and as it is more probable that it should come from the father than from the mother, does not suffer any of her blood to inherit till the other stock is entirely extinct, a case which can very seldom happen; this is the law applicable to every case where a man is in fact the first purchaser of lands, which he is presumed to hold as a feud of indefinite antiquity; but, in cases where the land did in fact descend from the father, the collateral heirs of the mother can never inherit.

Part II.
Proof by heir.

shew the marriages of the plaintiff's father and mother, birth, the marriage of the father and mother of the person seised, and that he is descended from them; as to the mode of proving which, nothing need be added to what has been already said, except that as we advance nearer to our own time, more correct and authentic evidence is expected than is to be looked for of more remote or early transactions.

The deaths of the persons last seised, and of the plaintiff's father are next to be proved, and if there ever existed any person in the pedigree who stood before the lessor of the plaintiff, he should be prepared with evidence to shew the death of such person, for, by the general rules of law, he who asserts the death of another who was once living, must prove the death. Whether the affirmative issue be that he is dead or living, (1) to prove the fact of death we generally have the assistance of parish registers of burials; but where families have been scattered abroad, and are not of any considerable station in life, they are not always to be found, and sometimes do not even exist. The reputation, therefore, of the family that their relation died abroad and died there, or inscriptions on tomb-stones,

(1) *Throgmorton v. Walton*, 2 Roll. Rep. 461. *Wilson v. Hodges*, 2 East, 312.

(2) *Ante*, 22. which are a species of reputation, is sufficient; (2) and if he has not been heard of for seven years, (3) and was never known to have been married, (4) this is in every case *prima facie* evidence to presume his death without issue, until the contrary is proved. (b) In cases of shorter absence than seven years, the

(3) *Doe dem. Banning v. Griffith*, 15 East, 293.

(4) *Roe v. Hasland*, 1 Black. 404. *Doe v. Jenson*, 6 East, 80.

(b) Ignorance in a family of the existence of one of the children who had been abroad at the age of twenty-two years unmarried, and had not been heard of for upwards of forty-years, is sufficient to warrant a presumption of his death without issue. *M^r Comb v. Ogilvie*, 5 Johns. Ch. Rep. 263.

An absence of forty or fifty years, and not being heard of, is sufficient evidence of death to non-suit a plaintiff. *Anon.* 2 Hayw. Rep. 134.

The general reputation and tradition in a family of the death of one of its members, and of his having died seised of real estate, is evidence of those facts, in an action of ejectment for such estate, by another of the same family claiming the deceased. *Pancoast's les. v. Addison*, 1 Har. & Johns. Rep. 350. *Vide* p. 24, note (u).—AM. ED.

* I have here mentioned the regular chain of evidence which is required to establish a title; but where a person has always been the acknowledged son, brother, nephew, or cousin of the person last seised, much less evidence will suffice; indeed, in one case, contended, that general evidence of a person being reputed to be heir in the family of the deceased, though his degree of relationship was not mentioned, nor any evidence given to shew a relationship, was *prima facie* evidence of title in him. The Judges of the Common Pleas agreed that this was not sufficient to go the jury; but they were divided on the question, whether, if any regular degree of distant relationship had been mentioned, it would have been necessary to have shewn a pedigree, proving the deceased and the claimant descended from some common ancestor, or at least, from two brothers or sisters, which is an immediate descent. *Vide* *Roe dem. Thorne v. Lord*, 2 Black. 1099.

sumption is that the party is still living, unless there is some evidence to rebut it. But this presumption may be rebutted by a contrary presumption without direct proof, as where a husband left his wife and went abroad, and the wife in little more than twelve months afterwards married again and had children, the presumption of law being that no one would commit a crime, it was held incumbent on the party who objected to the legitimacy of those children to prove the fact of the husband being alive at the time of the second marriage.⁽¹⁾

I have hitherto considered only those cases where a child is proved to be born in wedlock in the life time of its parents; but the title of an heir at law may involve more difficult considerations, viz. whether a child so born was in fact the issue of its supposed father.

Where a child is born of a woman legally married, during the lifetime of her husband, or within its usual time of gestation after his death, the presumption is, that such child is the issue of the husband; and, so strong was this presumption by the old rules of law, that if he were *within the kingdom** no evidence was admitted to prove the child a bastard, except the total inability of the husband to beget children, as being under the age of puberty or having some other equally palpable defect.^{(2)(c)}

It is now, however, holden, that this presumption may be rebutted by proof of *non access*,^{(3)†} as well as of total inability of

(1) *Rex v. Twyniog*, 2 Barn. & Ald. 386.

(2) Co. Lit. 244, a.

(3) *Pendrel v. Pendrel*, 9 Stra. 925.

* The legal phrase, *infra quatuor maria*, seems to have been always taken with this limitation. Sir *Edward Coke*, in his commentary on *Littleton*, above cited, says, "if the husband be within the four seas, that is, within the jurisdiction of the King of England;" and in *Jenk. Cent.* 10, pt. 18, it is said, "that if the husband be in Ireland for a year, and the wife in England, during that time, has issue, it is a bastard; but it seems otherwise now for Scotland, both being under one King, and make but one continent of land."

(c) A child born during marriage, may be proved to be a bastard—1st. By evidence of the husband's inability. 2dly. By proof of non-access to his wife. 3dly. By proof that the child was born out of due time; or 4thly. That it was born during her open co-habitation with another man, and was considered illegitimate by the family. *Commonwealth v. Stricker*, 1 *Browne's Rep. App.* xlvii.—AN. ED.

† In the marginal abridgment of the case of *Goodwright dem. Thompson v. Saul*, 3 *Term. Rep.* 356, it is said, "The child of a married woman may be proved to be a bastard by other evidence than that of the husband's non access." But it must not be understood from this, that if the husband has access within such a period of time as would probably produce a child, it is competent to shew that another person is the father. In that case it plainly appeared that another person lived with the wife; that she took his name; that the husband left her, and that the child bore the name of the person with whom she lived; but because it was not clearly ascertained where the husband was all the time, it was doubted whether non-access could

Part II.
Proof by heir.

(1) *Lomax v. Holmd. n. s.*
Sira. 940.

(2) *Rex v. Luffe, s.*
East, 193.

procreation by the husband ; (1) but still very strong evidence is required of these facts ; if the husband ever had access to his wife, within such a distance of time before the birth of the child as to render it *possible* for the child to be his, (2) the law will consider it to be so ; and where his habit of body was only such as to make it *improbable* that he should beget a child, and not to render such an event wholly impossible, verdicts have generally been in favour of legitimacy.

Where the parties are divorced, *a mensa et thoro*, the presumption is, that they did live apart, and the *onus* of proving access lies on the party who asserts the legitimacy of children born during such separation ; (3) but, in the case of a voluntary separation by agreement, the law presumes access, unless the contrary be proved. (4)

(3) *Salk. 123.*

(4) *Ibid.*

(5) *Vide Co. Lit. 123, b.*

As to posthumous children, Lord COKE (5) has laid it down that *forty weeks* is the latest time which the law allows after the death of the husband, and that all born after that time are to be deemed bastards. But as gestation may be accelerated or retarded by various causes, Mr. HARGRAVE has, I think, satisfactorily proved, in two learned and laborious notes on that passage of Lord COKE, that though the presumption may be against the legitimacy of children born at a later period, yet that there is no positive rule of *law* which determines that they are not children of the deceased husband ; that in every case it must be considered as a question of *fact* to be determined by evidence ; and accordingly we find that where a woman had been delivered after the usual time, physicians were examined as to the cause, and on their evidence the issue was found to be legitimate. (6)

(6) *Also v. Bowtell, Cro. Jac. 541.*

(7) *Ante, 256.*

I have before (7) had occasion to mention how far the parents are admissible witnesses, or where their declarations may be given in evidence on questions of this nature. I shall only add, that the party who disputes the legitimacy may give general

be presumed. The Judge, at the trial, thought this was not sufficient to rebut the general presumption of access ; but he and the rest of the Court were afterwards of a different opinion : and in the case of the *Banbury Peerage, s. Selwyn's Mai Prim*, 681, it was held, that though the husband and wife had the opportunity of access, the presumption of legitimacy arising from that fact might be rebutted by circumstances raising a contrary presumption. In a late case, where the husband was proved to have gone beyond seas two years before the birth of a child borne by his wife, (who remained at home,) and to have been abroad till within four months of the birth, the Court held the conclusion that such child was a bastard to be irresistible. *Rex v. Inhabit. of Maidstone, 12 East, 550.*

evidence that the mother was a woman of ill fame, but he cannot, while she is living, prove her declarations, unless for the purpose of contradicting her after she had been examined as a witness.(1)

Ch. XIV. s. 1.
Proof by heir.

(1) *Pendrel v. Pendrel*, 2 Stra. 925.

SECTION II.

Of the proof of title by the devisee.

If the action be brought by a devisee, he has only to prove the seisin of his testator, and the due execution of the will; but, as a particular form of execution is pointed out by the Statute of Frauds, and many decisions have taken place upon that Statute which cannot be very well reconciled with each other, it may be necessary to state them at some length.(d)

Sect. 2.
Proof by
devisee.

By that Statute, viz. 29 Car. 2, c. 3, s. 5, it is enacted, that, "all devises and bequests of any lands or tenements, devisable either by force of the Statute or wills, of by that Statute, or by force of the custom of Kent, or the custom of any borough,

(d) For the execution of wills, vide in *Massachusetts*. *Chase et al. v. Lincoln* exr. 3 Mass. Rep. 236. *Sears v. Dillingham et al.* exrs. 12 Do. 358. *Amery v. Fellowes*, 5 Do. 219.

In *Connecticut*. *Witter et ux. v. Mott et al.* 2 Con. Rep. 67. *James v. Marvin* et al. 3 Do. 576.

In *New Jersey*. *Den v. Vancleve*, 2 South. Rep. 589.

In *Pennsylvania*. *Bight v. Wilson*, 1 Dall. Rep. 94. *Lewis v. Maris*, *ibid.* 278. *Dessebate v. Berquier*, 1 Binn. Rep. 336. *Arndt v. Arndt*, 1 Serg. & R. Rep. 256. *Plumbsteads Appeal*, 4 Do. 545. *Les. of Stein et al. v. North*, 3 Yeates' Rep. 323.

In *Maryland*. *Clayland's les. v. Pearce*, 1 H. & M. Hen. Rep. 29. *Crow v. Scott*, *ibid.* 182. *Les. of Shaffer et al. v. Corbett*, 3 Do. 513. *Russell et al. v. Moor Falls*, *ibid.* 457. *Collins v. Elliott*, 1 H. & Johns. Rep. 1.

In *Virginia*. *Beverly v. Fogg*, 1 Call's Rep. 484. *Cogbill v. Cogbill*, 2 H. & Munf. Rep. 467. *Burrell v. Corbin*, 1 Randolph's Rep. 131.

In *North Carolina*. *Anon.* 2 Hayw. Rep. 3. *Hampton v. Garland*, *ibid.* 147. *Ward v. Wickers*, *ibid.* 164. *Elbeck v. Granberry*, *ibid.* 232. *Reel v. Reel*, 1 Hawk's Rep. 248. *Harrison v. Burgess*, *ibid.* 384. *Trustees v. Blount*, 1 Tayl. Term. Rep. 13.

In *South Carolina*. *Pearman v. Wightman*, 1 Rep. Const. Ct S. Car. 345. *Haywood v. Hazard*, 1 Bay's Rep. 335. *Snelgrove v. Snelgrove*. † *Desaus. Rep.* 305. *White v. Holmes*, 1 M. Cord's Rep. 430. *Hopkins v. De Graffenreid*, 2 Bay's Rep. 187. *Jane v. Alburton*, *ibid.* 484.

In *Kentucky*. *Ray v. Walton*, 2 Marsh. Rep. 73. *Elmsendorf v. Carmichael*, 3 Little's Rep. 479.—AM. EN.

Part II.
Proof by
devisce.

or any other particular custom, shall be in writing, and signed by the party devising the same, or by some other person in his presence, or by his express direction; and shall be attested and subscribed in presence of the devisor, by three or four credible witnesses, or else shall be utterly void and of none effect."

What within
the Statute.

(1) *Roe dem.*
Gilman v.
Heyhoe, 2
Black. 1114.

Signing by
the testator.

(2) *Gillb. Eq.*
Rep. 169, &c.

(3) *Whit-*
church v.
Whitechurch,
2 P. W. 236.
1 Stra. 621.

(4) *Lemayne*
v. Stanley, 3
Lev. 1. 3
Mod. 219.
S. C.

(5) *Right*
dem. Cator v.
Price, Dougl.
241.

(6) *Lemayne*
v. Stanley,
ubi supra.

1. In the first place it is to be observed, that devises of *copyhold*, (1) or of mere chattel interests, (2) (unless where a term is assigned to attend the inheritance,) are not within this Statute; but any estate (3) for years, or otherwise carved out of a freehold, are subject to the provisions of it.

2. In cases within the Statute, the first solemnity required by it is *signing*, and several cases have come before the Court on the question as to what shall be deemed to be such.

It has been determined, that if the testator write his will himself, beginning "I, A. B." this is sufficient, though he does not sign his name at the bottom. (4) But where it appears that he intended to sign his name at the bottom of each sheet of a will, consisting of more than one, and through weakness or incapacity was prevented from signing his name to some of the sheets, the signature to the others will not, it has been said, give effect to an instrument which it appears he did not consider as fully completed. This was, at least, the opinion of the Judges of the Court of King's Bench in one case, but the cause being decided against the will on other grounds, no judgment was given on this point. (5) (e)

The effect of *sealing* alone does not seem to be yet decided. It was in one case (6) said that this was *signing*, within the meaning of the Act of Parliament, and Lord RAYMOND is re-

(e) To constitute a valid will of lands in *Pennsylvania*, it is not necessary—1st. That it should be sealed. 2d. Nor that all the subscribing witnesses should prove its execution. 3d. Nor that the proof of the will should be made by those who subscribed as witnesses. 4th. Nor that the will should be subscribed by the witnesses. *Hight v. Wilson*, 1 *Dall. Rep.* 94.

In *Virginia*, where a will devising real estate was written and signed by another, and there were two subscribing witnesses, one of whom saw the signature, and heard the testator acknowledge that it was done by his authority, and the other not testifying whether the paper was signed or not at the time of his attestation, the testator merely declaring, "It is my will," it was held the paper was not sufficiently proved under the Statute. *Burrell v. Corbin*, 1 *Randolph's Rep.* 131.

In *North Carolina*, the signing of a testator may be proved by his having acknowledged it, though the signature was not before him, and the paper lay at a distance. *Eelbeck v. Granberry*, 2 *Hayw. Rep.* 232.

In *South Carolina*, where a will is written on several sheets of paper, it never has been determined that the testator must sign them all. *Pearson v. Ffightsman*, 1 *Rep. Const. Ct. S. Car.* 345.—*Am. Ed.*

ported so to have ruled.(1) But in a subsequent case,(2) Lord Ch. XIV. s. 2. HARDWICKE, though he inclined to think this would be sufficient, said it was a point proper to be determined at law; and, in a still later case,(3) the Court of Common Pleas declared an opinion to the contrary, but no formal judgment was given on the point.

The will is directed to be attested by at least three witnesses; but considerable doubt seems to have been entertained how far it is necessary for the testator to publish the will to them at the time of the execution; Lord HARDWICKE, in *Ross v. Ew-er*,(4) considered it to be necessary, and mentioned the case of the will of Mr. *Windham of Clearwell*, where his Lordship said there was no doubt of the testator having executed the will in the presence of three witnesses, or, of their having attested it in his presence; which, he observed, shewed that publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form. But in subsequent cases where the point has arisen, this seems to have been considered as proved by the very fact of attestation by the witnesses; for, in the first place, it has been holden that a delivery as a deed is a sufficient publication;(5) and even where the testator presented it to the witnesses to be a deed, and the attestation was "sealed and delivered,"(6) the will was holden to be duly published; and in another case,(7) tried before Mr. Justice DENISON, at *Lincoln*, where the testator told the witness "to take notice," and then signed the paper and shewed them where to write their names as witnesses, without saying what the instrument was; this was also holden by the Judge to be a sufficient execution; and a similar decision was made by Lord Chief Justice TREVOR, in the case of *Peate v. Ogily*, which I shall presently have occasion to cite more at large for another purpose.(f)

But the doubt in most of the cases which have arisen on this clause of the Act of Parliament, has been, what shall be a sufficient attestation by the witnesses.

First, it has been determined, that though the witnesses must all sign their names, or, in case they are illiterate, make their marks,(8) as witnesses in the presence of the testator, yet that they not do so in the presence of each other;(9) and, therefore, where the testator, having executed his will in the presence of two persons, who subscribed their names as witnesses in his pre-

(f) The execution of a codicil is an implied revocation of a will. *Dunlap et al. v. Dunlap et al. & Desauss. Rep.* 305.—*Am. Ev.*

Signing by the testator.

(1) *Warnford v. Warnford*, 2 Stra. 764.

(2) *Gryle v. Gryle*, 2 Atk. 176.

Publication of will.

(3) *Vide Smith v. Evans*, 1 Wils. 313.

(4) *Vide also Ellis v. Smith*, 1 Ves. jun. 11.

(5) 3 Atk.

156.

(6) 8 Vin. Abr. 125, pl. 13.

(7) *Trimmer v. Jackson*, 4 Burn's Eccl. Law, 114.

(8) *Wallis v. Wallis*, bid. 117.

Attestation by witnesses.

(8) *Harrison v. Harrison*, 8 Ves. jun. 185. *Addy v. Grix*, Id. 504.

(9) *Smith v. Croddon*, cited 2 Ves. 455.

Grayson v. Atkinson, 2 Ves. 454. *Jones v. Lake*, cited 2 Atk. 177.

Part II.
Attestation by
witnesses.

sence, at a distant time afterwards called in a third person, and, shewing him his name, *told him it was his hand-writing*, and desired him to witness it, which he did also in the presence of the testator, it was holden that this was a good execution in the presence of three, and was properly attested by them.(g)

It follows from this decision that all the witnesses need not see the testator write his name; and accordingly it was determined by Sir JOSEPH JERKILL, that where three witnesses subscribed their names as witnesses in the presence of a testatrix, but *one* of them said that he *did not see her sign* her name, but that she *owned* at the time *that the signature was her hand-writing*, that this attestation was sufficient.(1) But where the testator signed in the presence of two witnesses, and afterwards, in the presence of the third, said, *this is my will*, but did not put his seal, *or acknowledge the hand-writing*, Lord HARDWICK inclined to think this was not a perfect execution, but gave no judgment, as the cause stood over on another part of the case.(2)

(1) Stonehouse v. Evelyn, 3 P. Will. 253.

(2) Gryle v. Gryle, 2 Atk. 176.

Peate v. Ogily, Comyns, 197.

In the case of *Peate v. Ogily*, before alluded to, the testator had written the will himself, and signed his name, and put a seal at the bottom, and had added also, in his own writing, "signed, sealed, and published, as my last will and testament, in the presence of —," two of the witnesses were dead, and the third swore that, about twenty-eight years before, being then servant to the testator, he and the other witnesses were called up in the night, and ordered to the testator's chamber, who produced a paper folded up, and desired him and the others to set their hands to it as witnesses, which they did in his presence; but the witness did not see any of the writing, nor did the testator say it was his will, or what it was; but he believed this to be the paper, because he never witnessed any other paper for the testator; and added that, though the testator did not set his name or seal to the will in their presence, yet he had often seen him write, and believed the whole will and codicil to be of his hand-writing; Lord Chief Justice TAYLOR thought the evidence sufficient for the jury to find the will well executed, and they found accordingly. It must be noticed in this place, that it is said by the reporter of *Stonehouse v. Evelyn*, that, on his mentioning that case to Mr. Justice FORTESCUE ALAND, he said, that it was sufficient if *one* of the three witnesses swore that the testator acknowledged the signing to be his own hand;

3 P. Will. 253.

(g) *Russell et al. v. Moor Falls*, 3 H. & M. Hen. Rep. 457. *Harrison v. Burgess*, 1 Hawk's Rep. 384.—AM. ED.

"from whence," Mr. *Powell* observes, "it seems a necessary inference, that such an acknowledgment at least is necessary to support the attestation;" but perhaps it may be questionable whether this observation is applicable to all cases. Where a will is written by a third person, and signed by the testator at the bottom, it may be said that without such acknowledgment there is no other evidence of the will having been signed by him, than that arising from similitude of hands, and therefore it does not appear but that the signature might be made afterwards by the testator when alone, but where a will is written wholly by the testator, as was the case in *Peate v. Ougley*, and the testator's name is in the body of the will, or as in that case in such a place as evidently shews that it must have been written at the time of attestation, it should seem that no such acknowledgment is essential to its validity, because the bare inspection proves that the whole must have been written before it was attested by any of the witnesses.

Ch. XIV. s. 2.
Attestation by witnesses.

Powell's Law
Dev. 80.

Vide *Le-*
mayne v.
Stanley, ante,
574.

Though the witnesses need not, according to the foregoing cases, all attest at the *same time*, or in the presence of each other, yet it has been holden, that unless they all attest *the same instrument*, and that whereby the lands are intended to pass, the requisites of the act are not complied with, although the testator by a subsequent paper evidently meant to confirm the first.^(h)

And therefore, where a testator devised his lands by a will made in the presence of, and attested by two witnesses only, and about a year afterwards made a codicil whereby he revoked a legacy given by his will, and declared that the will should be ratified and confirmed in all things, except as altered by that writing, and that this codicil should be taken as part of his will; and executed his codicil in the presence of one of the former witnesses and another person, neither the other witnesses nor the first will being present, it was holden that this attestation

(h) To constitute a valid will for the disposition of real estate, it is necessary that it should be reduced to writing, in the life-time of the testator, and proved by two witnesses; but signing by the testator, formal publication and attestation by subscribing witnesses, are not required. *Rosseter v. Simmons et ux.* 6 *Serg. & R. Rep.* 452. Et vide *Hock v. Hock*, *ibid.* 47.

Where the execution of a will is so proved, one witness is enough to rebut the imputation, that a paper of the contents of which he was ignorant, was imposed on him. So one witness is enough to set aside a will on account of fraud. *Lewis v. Lewis*, 6 *Serg. & R. Rep.* 459.

A memorandum written by the testator in *his own hand writing* (though his name appeared in no part of it) was established to be a good codicil. *Cogbill v. Cogbill*, 2 *H. & Muf. Rep.* 467.—AM. Ed.

Part. II. was not sufficient ;(1) and in another case,(2) where a man h
 Attestation by ing made his will, written with his own hand, and signed
 witnesses. sealed, but not witnessed, afterwards made a codicil attested

(1) *Lea v. Libb, Carth. 35.* four witnesses, which was called a codicil to be annexed to
 last will, but the will was not produced at the time of execu
 the codicil ; it was also holden that this will was void for v
 of a due attestation.

(2) *Attorney General v. Barnes, Pres. Ch. 370.* In the last case the Court seems to have laid some stres
 the circumstance of the first will not being produced at the t
 the codicil was executed : but in one which afterwards c

(3) *Pem- phrase v. Lord Lansdown, cited Comyns, 384.* before the Court,(3) the mere production of the will was hol
 not to be sufficient to give it validity. The testator having,
 will not witnessed, devised lands, afterwards made a codicil,
 taking the codicil in one hand, and the will in the other, said, "I
 is my will whereby I have settled my estate, and I publish this
 dicil as part thereof," and then signed the codicil (which lay u
 the table with the will) in the presence of seven witnesses,
 subscribed it in his presence. The testator then put the will
 codicil together into a sheet of paper, and sealed them up in
 presence of the same witnesses, but the will was not unfold
 their presence, nor did any of them write their names upo
 or on the paper wherein it was enclosed, and notwithstanding
 the fact of the will being so produced, and the codicil itself
 citing the will and the words "I, by this codicil, which I
 point to be taken as part of my will," being used in it, J
 KER, Ch. Justice, and the Court, on a trial at bar, held the
 to be void.

In the above cases the Court evidently considered the
 cil as a separate instrument from the will, and, upon that gro
 determined that there was no due attestation of the former; b
 several writings be made by a testator on the same paper, a
 plainly appear that his intention was that all should form but
 will, and not a will and codicil; in such case the execution o
 last will be considered as the execution of the whole ; and th
 fore, where the testator wrote, upon a sheet of paper, a will,
 ed 2d May, 1752, whereby he disposed of lands, and sign
 but which was not sealed or attested ; and afterwards wrot
 the same sheet of paper, a memorandum, dated 5th Jan.
 wherein after disposing of some personalty, he added, "I do
 not to disannul any of the former part made by me the s
 May, 1752, except that my wife shall not be liable to pay
 son John," &c. and subscribed the latter memorandum, and
 lished the whole in the presence of three witnesses ; the C

Carleton dem. Griffin v. Griffin, 1 Burr. 549.

held this a good attestation of the whole, which they considered as *one* will, the second being a mere continuation of the first. In this case Lord MANSFIELD observed, the memorandum was not called a *codicil*. But even supposing the second were called a *codicil*, yet if written on the *same piece of paper*, "it seems," as is observed by Mr. *Powell*, "that whether the subscription belongs to both instruments is a fact to be determined by a jury on all circumstances." There certainly would be no danger in leaving it to the jury in such case, as there might be when the will and codicil were written on *separate papers*, for one paper could not be substituted for another, as might be the case if the attestation of a codicil on a separate paper were to be under any circumstances considered as an attestation of a former will.

Ch. XIV. s. 2.
Attestation by
witnesses.

A will, indeed, made at one time, on several sheets of paper, has been holden to be valid, though all the sheets are not signed by the witnesses: but every part of it must be present at the time of the execution, for if the last piece of paper only be attested by three witnesses, and none of them ever saw the first, it is not a good will.⁽¹⁾⁽ⁱ⁾ But unless this fact be expressly proved, the presumption, in cases where the sheets correspond, will be, that the whole will was in the room at the time. And, therefore, where a testator made his will, consisting of two sheets of paper, all of his own hand-writing, and signed his name at the bottom of each page, and made a codicil also of his own hand-writing on a single sheet, and then shewed *the whole of the will and codicil* to one witness, who attested both in his presence; and two other persons coming in immediately afterwards, the testator shewed the codicil and *last sheet of his will* to them, and sealed and published both papers in their presence, and they attested both instruments; and the whole will and codicil, after the death of the testator, were found wrapped up in the same paper in his bureau, but the two sheets of the will not pinned together; this was holden to be a good attestation, though the two last witnesses never saw the first sheet of the paper, nor was it produced to them.^{(2)(k)*}

(1) 3 Mod.
263. 1 Eq.
Cas. Abr.
403. 7.

(2) Bond v.
Seawell, 3
Burr. 1773.

(i) Vide *Pearson v. Wightman*, 1 Rep. Const. Ct. S. Car. 345.—AM. ED.

(k) Vide *Dunlap et al. v. Dunlap et al. & Dessaus*, Rep. 305.—AM. ED.

* The distinction as to the finding of evidence and facts, which I have so often had occasion to allude to, occurred in this case. This evidence being stated on a special case, which it was agreed might be turned into a special verdict, Lord MANSFIELD said, that the due execution of the will could not be come at in the method wherein the matter was then put, for, considered as a *special verdict*, it was

Part. II.
Subscription
in the pre-
sence of the
testators.

The witnesses must write their attestations in the presence of the testator; but what shall be deemed to be his presence has often been made a question in a Court of Justice.

If the testator were in such a situation that he might have seen the witnesses attest the instrument, though there is no positive proof that he did see them do so, as if, after seeing the testator sign the will, they withdraw to another room, and there sign their attestation on a table opposite to the door of the room

(1) *Sheers v. Glascock*, Salk. 688.
(2) *Davy v. Smith*, Salk. 393

where the testator lies, (1) or the testator calls at his attorney's and executes his will sitting in his carriage, and the witnesses, after seeing the execution, return to the office to write their attestation, the carriage being in such a situation that the testator might see what passed in the office; (2) or the curtains are drawn round the testator's bed, and the witnesses attest in the same room, (3) these are all valid attestations, because the testa-

(3) *Davy v. Smith*, ubi sup.

tor had the power of seeing the attestation, if he chose to exercise it. But if the testator were in such a position that he could

(4) *Eccleston v. Petty*, alias *Spike*, Carth. 79.

not see the witnesses subscribe, as when the witnesses subscribed in another room, out of his sight, (4) though he expressly desired them to retire, on account of the heat and noise of the room disturbing him, (5) such execution will not be good; the design of the Statute being to prevent a wrong paper from being

(5) *Machel v. Temple*, 2 Show. 288.

obtruded on the testator, in the place of the true one; and for this reason it is, that even if the testator has signed his will, and be personally present, yet if his mental faculties are gone before the witnesses actually sign their attestation, the requisites of the Statute are not complied with. (6) (7)

(6) *Right dem. Cator v. Price*, Dougl. 241.

The last thing to be considered in the attestation of a will, is, who may be witnesses to it. The Act requires that they shall be *credible*, but what persons the law considers to be such, has been matter of much controversy. (m) I had occasion, in the for-

Ante, 214.

defectively found as to the point of the legal execution of the will; that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstance sufficient to *presume* that the first sheet was in the room, and that the jury ought to have been so directed; but upon a special verdict nothing could be presumed, therefore it must be tried over again; and, if the jury should be of opinion that it was then in the room, they ought to find for the will generally.

(1) *Vide Amory v. Fellowes*, 5 Mass. Rep. 219.—AN. ED.

Witnesses to will, &c.

(m) In *Massachusetts*, the words *credible witnesses* in the Stat. of 1783, c. 24, s. 2, must be construed to mean *competent witnesses*, and who were so at the time of

mer part of this work, when speaking of interested witnesses, to remark the difference of opinion which prevailed between Lord Chief Justice LEX and Lord MANSFIELD on this point, and to mention the Act of Parliament which had been made in consequence of the decision of the case of *Anstey v. Dowsing*. That Statute has provided for some cases; but, in such as are not within its express provisions, it seems still doubtful whether witnesses, interested at the time of the attestation, can be made good by a subsequent release: (1) and it is clearly settled, that if either of the witnesses be infamous at the time of subscription, the will is not properly executed. (2)

Ch. XIV. s. 2.
Of the credibility of the witnesses.

(1) See *Hudson v. Kersey*, 4 Barn. Ecol. Law, 97; and *Powell's Law of Devises*, 139, &c.

To conclude, it appears from the foregoing cases, that, to prove a will properly executed, within the Statute of Frauds, it must appear to have been executed by the testator, or some person for him; and to have been attested by three credible witnesses, either at the same or different times; that the witnesses subscribed their names in the presence of the testator, and that they all saw the same instrument executed.

(2) *Pendock dem. Mackinder v. Mackinder*, 2 Wils. 18.

signing as witnesses. *Amory v. Fellowes*, 5 Mass. Rep. 219. *Sears v. Dillingham et al.* 12 Do. 358.

Where there was a devise to a society incorporated for pious and charitable purposes, the members of the society, (being mere trustees to convey the testator's bounty to the objects of the institution,) were held competent witnesses to prove the sanity of the testator when he made his will. *Nason v. Thatcher et al.* 7 Mass. Rep. 398.

A witness to a will is competent to prove its execution, although the wife be a devisee of real estate in the will, if he and his wife join in a release of their interest under it. *Shaffer v. Corbett*, 3 H. & M. Hen. Rep. 513.

In *Kentucky*, a witness to a will, who holds a covenant of warranty from the testator, stands indifferent between the heir and devisee. *Thompson v. Sheeman*, 1 Bibb's Rep. 401.

In *Tennessee*, by Act of the Legislature, children of a testator are competent witnesses to a will, provided none of the lands of the testator are devised to them. *Allen v. Allen*, 2 Term Rep. 172.

In *Connecticut*, the wife of an executor was held to be a competent witness to a will, he having no interest but a trust in the estate. *Hawley v. Brown*, 1 Root's Rep. 494.

The Judge of the Probate is a good witness. *M. Lean v. Barnard*, *ibid.* 462. *Ex parte case of Ford*, 2 Root's Rep. 232.

But a legatee is not a competent witness. *Starr v. Starr*, 2 Root's Rep. 303.

The inhabitants of an incorporated society, to whom property is devised, for the support of a school are competent witnesses to attest a will. *Cornwell v. Ishem*, 1 Day's Rep. 35.

If a witness be incompetent at the time of attestation, he cannot become competent afterwards by release, &c. so as to support the will. *Cornwell v. Ishem*, *ibid.* 41, n.

By a Statute of *New York*, similar to 25 Geo. 2, if either husband or wife be a witness to a will, containing a devise or legacy to the other, it is void, and they can-

Part. II.
Formal proof
of will.

Longford v.
Eyre, 1 P.
Will. 741.

To prove these facts the original will should be produced, one, at least, of the subscribing witnesses, if living, be called. If he can prove the due execution by the testator, in the presence of himself and the other witnesses, and their subscription in the presence of the testator, there will not, unless in cases where the will is disputed, be any occasion to call the others. But when the will is disputed, the devisee should call all the subscribing witnesses, and if they deny the due execution or the sanity of the testator, he will then be at liberty to

(1) *Vide* Bal. other witnesses. (1)

N. P. 264.
Lowe v. Jol-
liffe, 1 Black.
365. Good-
title dem.
Alexander v.
Clayton, 4
Burr. 3224.

(2) *Hands v.*
James, Com-
myns, 531.
Croft v. Pau-
let, 4 Stra.
1109.

When it becomes necessary to prove the will after the death of all the subscribing witnesses, their hand-writings should be proved; and, in such case, unless there be some strong circumstances to shew the contrary, the presumption is, that it was duly executed; and even where the form of attestation has not been strictly pursued, the presumption will, nevertheless, prevail. (o) Thus, in two cases, (2) where, after the death of all the witnesses, the attestation appeared to be "signed, sealed, published, and declared, by the testatrix, as her last will and testament, in the presence of us ———," and it was objected, it did not appear that the witnesses subscribed in the pres-

not become competent witnesses. *Jackson ex d. Cooder v. Woods*, 1 Johns. 163. *Jackson ex. d. Beach v. Durland*, 2 Do. 314.

And the witness cannot convey any right to another. *Jackson ex d. Deane et al. v. Denniston*, 4 Johns. Rep. 311.

In *New Jersey*, an executor was held to be a competent witness to a will, if he take an interest under it. *Denn ex d. Snedeker v. Allen, Penning*. Rep. 4

On the trial of a feigned issue of *devisee vel non*, the declarations of a defendant not party to the suit, cannot be received to invalidate the instrument set up as a will. *Bovard et ux. v. Wallace et al. 4 Serg. & R. Rep. 409.*

A witness to a will, will be held competent, though he declare a legacy bequeathed was for his benefit, and to render him incompetent, there must be proof that his declaration. *Rogers v. Briley*, 1 Raym. Rep. 256.

Where all the witnesses to a will are legatees, they are not competent, unless release be executed by the one offering himself as a witness. *Dickson v. 2 Bay's Rep. 448.*

But if a witness to a will be *disinterested* at the time of executing the will, and interested when produced as a witness, he cannot be admitted. *Hampton v. land*, 2 Hayw. Rep. 147.—AN ED.

(n) Probate may be granted of a copy of a will where the original cannot be produced. *Happy v. Will*, 4 Bibb's Rep. 553.—AN ED.

(o) Thirty years possession by virtue of a will, is presumptive evidence of due execution, but such time must be computed from the time of the testator's death. *Jackson ex d. Burhans v. Blanshan*, 3 Johns. Rep. 392. Et vide *Jackson v. Van Dusen v. Van Dusen*, 5 Do. 144.—AN ED.

of the testatrix; this fact was left to the jury, and they found, Ch. XIV. s. 2. under the direction of the Court, that the witnesses did so sub- Insanity.
cribe, and that the will was properly executed.

SECTION III.

Of evidence by the heir to defeat the will.

To defeat the will the heir-at-law may prove that it is a forgery; that the testator was insane, or under influence or coercion; or, that if it were once a legal or valid instrument, its operation has been destroyed by a subsequent act of the testator. (p) Sect. 3.
Evidence to
defeat the will.

As to the objection on account of forgery, the fact will, in a great measure, depend on the veracity of the subscribing witnesses, and on the hand-writing of the testator. Any circumstances, therefore, which go to impeach the credit of the witnesses, or to shew that the signature, purporting to be the name of the testator, is not of his hand-writing, will be proper to be adduced in evidence. We have before had occasion to consider

(p) The testator may be proved to have been under duress, but the declaration of the testator to that effect, made after the execution of the will, cannot be received. *Jackson ex d. Coe et al. v. Koniffer, 2 Johns. Rep. 31.*

The fact that the testator wrote the will, altogether in *his own* hand-writing, is *prima facie* evidence of his being *sane*, and throws the *onus probandi* of insanity on the other side. *Temple v. Temple, 1 H. & Munf. Rep. 476.*

In such a case evidence that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and in consequence thereof he was frequently incapable of business, is not sufficient to repel the presumption of *sanity* at the time the will was executed. *ibid.*

Grammatical inaccuracies, ignorance on points of law, an omission of part of testator's property, will not of themselves vitiate a will. *ibid.*

The presumption is always in favour of mental capacity; and he who alleges the contrary, for the purpose of invalidating the deed or will, must prove it. *Les. of Hoge v. Fisher et al. 1 Peters' Rep. 163. Kimlock v. Palmer, 1 Rep. Const. Ct. S. Car. 325. Et vide Turner v. Turner, 1 Littell's Rep. 103.*

Drunkenness merely of itself, is no legal exception to the validity of a will, unless it absolutely disables the party from disposing of his estate with intelligence and reason. Per *YEATES J. Starrett v. Douglass, 2 Yeates' Rep. 46.*

A man has a right by fair argument or persuasion, to induce another to make a will, and even to make it in his own favour. *Miller et al. v. Miller, 3 Serg. & R. Rep. 269. Rambler et al. v. Tryon et al. 7 Do. 90.*

The failure of the inducement to a legacy does not invalidate it, unless it be founded on fraud or gross misrepresentation. *Taylor v. James, 4 Dessaus. Rep. 11.*

Part II.
Insanity.

how far comparison of this signature, with other writings of the testator is admissible.

Insanity may be of three kinds, idiotcy, fatuity, and madness or lunacy.(q)

Fitzh. N. B.
233.

A perfect idiot, or natural born fool, viz. one who could never tell his parents, or his age, or who is not able to count a small sum of money, or transact the like common matters, is totally incapable of making a will; and so notorious must this defect be, that it is hardly possible to suppose the case of an attempt to set up a will as made by a person of this description.(r)

A will is not valid unless the testator knew at the time of executing it, that it was his will. *Sweet et al. v. Boardman*, 1 *Mass. Rep.* 258.

The bequest of an article of property which does not belong to him is, at most, only an incident from which to presume insanity, and ought not to prevail against positive testimony, shewing his competency to make a will at the time in question. *Marks v. Bryant*, 4 *H. & Munf. Rep.* 91.

An administrator may shew the insanity of the testator in avoidance of contracts, besides the execution of a will. *Lazell v. Pinnick et al.* 1 *Tyl. Rep.* 247.

A devise by a wife to her husband, is void. *Adams v. Kellogg*, *Kirb. Rep.* 195—438. *S. P. Fitch v. Brainerd*, 2 *Day's Rep.* 163.

But where the estate of the wife was only an equitable interest, it was held she could, during coverture, make an appointment, in the nature of a will, this power being given to her by the husband in the marriage articles. *Barnes' les. v. Irwin*, *et al.* 2 *Dall. Rep.* 199. *S. C.* by name of *Barnes' les. v. Hart*, 1 *Yeater' Rep.* 221.

Evidence is admissible of the declarations of the testator, made at any time subsequent to the execution of the will, tending to shew that the testator believed the contents of the will to be different from what they really are. *Reel v. Reel*, 1 *Hawk's Rep.* 248.—*AM. Ed.*

(q) The subscribing witnesses to a will may testify their opinion of the sanity of the testator; other witnesses may testify facts from which the Court and jury may form an opinion whether the testator was *compos* or not. *Peole v. Richardson*, 3 *Mass. Rep.* 390.

Other witnesses may testify to the appearance of the testator, and to particular facts, from which the state of his mind may be inferred; but they will not be permitted to testify to their opinion or judgment merely of his sanity, without stating the facts, from which they draw their conclusions. *ibid.* *Buckminster et al. v. Perry*, 4 *Do.* 593. *Hathorn et al. v. King exr.* 8 *Do.* 371. *Sed vide Collins v. Elliott*, 1 *Har. & Johns. Rep.* 1.

An attesting witness may be offered to disprove the sanity of the testator. *Hampton v. Garland*, 2 *Hayw. Rep.* 147.

The witnesses to a will are called not only to attest the fact of signing, but also to determine the capacity of the testator, whether he was *sane* or *insane* at the time of executing such will. *Heyward v. Hazard*, 1 *Bay's Rep.* 335.

But an executor is not a competent witness to prove the sanity of the testator. *Hayden v. Loomis*, 1 *Root's Rep.* 350.—*AM. Ed.*

(r) On the trial of the validity of a will impeached on the ground of imbecility of the testator from childhood to death, the opinion of other witnesses than: those who attested the will, who knew him during that time without stating any facts, is not admissible, but when they state facts as the ground of the opinion, it is good evidence. *Rambler et al. v. Tryon et al.* 7 *Serg. & R. Rep.* 90.—*AM. Ed.*

ported so to have ruled.(1) But in a subsequent case,(2) Lord Ch. XIV. s. 2. HARDWICKE, though he inclined to think this would be sufficient, said it was a point proper to be determined at law; and, in a still later case,(3) the Court of Common Pleas declared an opinion to the contrary, but no formal judgment was given on the point.

The will is directed to be attested by at least three witnesses; but considerable doubt seems to have been entertained how far it is necessary for the testator to publish the will to them at the time of the execution; Lord HARDWICKE, in *Ross v. Ewer*,(4) considered it to be necessary, and mentioned the case of the will of Mr. *Windham of Clearwell*, where his Lordship said there was no doubt of the testator having executed the will in the presence of three witnesses, or, of their having attested it in his presence; which, he observed, shewed that publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form. But in subsequent cases where the point has arisen, this seems to have been considered as proved by the very fact of attestation by the witnesses; for, in the first place, it has been holden that a delivery as a deed is a sufficient publication;(5) and even where the testator represented it to the witnesses to be a deed, and the attestation was "sealed and delivered,"(6) the will was holden to be duly published; and in another case,(7) tried before Mr. Justice DENISON, at *Lincoln*, where the testator told the witness "to take notice," and then signed the paper and shewed them where to write their names as witnesses, without saying what the instrument was; this was also holden by the Judge to be a sufficient execution; and a similar decision was made by Lord Chief Justice TREVOR, in the case of *Peate v. Ougly*, which I shall presently have occasion to cite more at large for another purpose.(f)

But the doubt in most of the cases which have arisen on this clause of the Act of Parliament, has been, what shall be a sufficient attestation by the witnesses.

First, it has been determined, that though the witnesses must all sign their names, or, in case they are illiterate, make their marks,(8) as witnesses in the presence of the testator, yet that they not do so in the presence of each other;(9) and, therefore, where the testator, having executed his will in the presence of two persons, who subscribed their names as witnesses in his pre-

(f) The execution of a codicil is an implied revocation of a will. *Dunlap et al. v. Dunlap et al. & Desauss. Rep.* 305.—AM. Ed.

Signing by the testator.

(1) *Warnford v. Warnford*, 2 Stra. 764.

(2) *Gryle v. Gryle*, 2 Atk. 176.

Publication of will.

(3) *Vide Smith v. Evans*, 1 Wils. 313.

Vide also *Ellis v. Smith*, 1 Ves. jun. 11.

(4) 3 Atk. 156.

(5) 8 Vin. Abr. 125, pl. 13.

(6) *Trimmer v. Jackson*, 4 Burn's Eccl. Law, 114.

(7) *Wallis v. Wallis*, ibid. 117.

(8) *Harrison v. Harrison*, 8 Ves. jun. 185. Addy v. Grix, Id. 504.

(9) *Smith v. Crodron*, cited 2 Ves. 435.

Grayson v. Atkinson, 3 Ves. 434. *Jones v. Lake*, cited 2 Atk. 177.

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3 Bro. Ch.
Cas. 440.

are more accustomed to act from their own whim and caprice than from the suggestions of others. The following observations of Lord THURLOW, in the *Attorney General v. Parmer*, will be found applicable to most cases of this description: "There can be (says his Lordship) no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it be true, that a mind in such possession of itself ought when acting to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried.

"The course of procedure for the purpose of trying the state of any party's mind, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement. If such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval; who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such case, applying to stated intervals, ought to go to the *state and habit* of the person, and not to the accidental interview of any individual; or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind, which is deemed necessary in general to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party, who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others."

This doctrine of Lord THURLOW, however, does not seem to have met with the full assent of others who have had occasion to consider the subject, (1) In the case of *White v. Driver*, (2) in the Ecclesiastical Court, Sir JOHN NICHOL observed, that though it was scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval, yet the law recognised acts

(1) Vide *Ex parte Holyland*, 11 Ves. 11.

(2) *White v. Driver*, 1 Phil. 88.

done during such an interval as valid, and that "the law must not be defeated by any overstrained demands of the proof of the fact." In a former case,⁽¹⁾ which had come before Sir W. WYNN, who was a very able Judge in the Prerogative Court, he observed, that "the strongest and best proof that could arise as to a lucid interval, was that which arose from the act itself; *that* he considered as the thing first to be examined; and if it could be proved and established, that it was a rational act rationally done, the whole case was proved." Sir WILLIAM then cited a passage from *Swinburne*, wherein it is said, that "if a lunatic person, or one that is beside himself at times, but not continually, makes his testament, and it is not known whether the same were made while he was of sound mind and memory or not, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions; yea, (he adds,) although it cannot be proved, that the testator used to have any clear and quiet intermission at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament." Having made this quotation, Sir WILLIAM then, in some measure, limits the generality of his former position, by saying, "Undoubtedly, there must be a complete and absolute proof that the party who had so framed it did it without any assistance;" but adds, "If the fact be so, that he has done without assistance as rational an act as can be, what then is more to be proved I do not know, unless it can be shewn by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know of no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient."

Perhaps, at last, the difference between these learned persons may have been more in words than substance. The *state and habit* of sober thinking, required by Lord THURLOW, may be evinced in some degree by the propriety and discretion of the act on which the testator's mind was employed; and if, as in the case first put by *Swinburne*, the testator was only beside himself at times, and it was not known otherwise than by the instrument itself whether he made it while of sound mind or not, the instrument would be one criterion by which the state of the

Ch. XIV. s. 3.
Insanity.

(1) Cartwright
v. Cartwright,
cited 1 Phil.
80.

the execution of such second will, it does not operate as a devise of the land, it will not have the effect of revoking the former will; and, therefore, where the second will was executed by the testator, in the presence of three witnesses, but they did not sign their names in his presence, (1) it was holden, that this did not operate to cancel the first will; for there did not appear to be any intention of the testator to revoke his will, without at the same time making another disposition of his property; and, as the whole of his intention could not take effect, the act done by him was considered as a nullity, and the old will remained.

Ch. XIV. s. 3.
Actual
revocation.
(1) *Egglestone v. Speke*, 1 Show. 89.
Carth. 80.
S. C. *Onions v. Tyrer*, 1 P. W. 348.

The second mode of cancellation, viz. the declaration of his intention to do so, by *writing*, signed in the presence of three or more witnesses, which writing is not in itself intended to operate as a will, does not, according to the opinion of Lord Cowper, require this formality of the subscribing witnesses signing in the presence of the testator; for this depends on the 6th section of the Statute only, which barely requires that the writing shall be so signed by the testator; whereas, when that section speaks of a *will*, such a will is intended as is required by the preceding section of the Act. And on the other hand, the words "signed in the presence of three or four witnesses," referring to the words *other writing*, and not to the word *will*, which, as we have seen before, may be good without being signed in the witnesses presence; a will properly executed, taking effect as such, operates as a revocation though not signed by the testator in the presence of the witnesses. (2)

Vide 1 P. Will. 344.
Cox's ed.
note (1.)

Lastly, a will may be shewn to be destroyed by its having been burned, cancelled, torn, or obliterated, though no other instrument has been made by the testator. But it must appear in proof that such burning, &c. was done *animo revocandi*, for the act is only considered as a symbol of the intention; and, therefore, if a man were to throw ink, instead of sand, on his will, it would not be an obliteration within this clause of the Act. (3) So, if having two wills of different dates by him, he should direct the former to be cancelled, and through mistake, the person to whom such directions were given should cancel the latter, this would be no revocation of such latter will. (4)

(2) Vide *Holl v. Clerk*, 3 Mod. 218, & *Ellis v. Smith*, 4 Burn's Eccl. Law, 199.
(3) *Vrs. Jan. 11*, S. C.
(4) *Per Lord Mansfield*, *Cowp. 52*, *Per Lord Cowper*, 1 P. Will. 346.

Actual revocation.

(1) In *Massachusetts*, a will may be revoked by a subsequent will or codicil, by burning or cancelling the same, by being torn or obliterated by the testator, or by his direction in his presence. *Avery et al. v. Pixley*, 4 Mass. Rep. 460.

second was not a perfect instrument, and never afterwards perfected such second will, it was holden that the first was not revoked.⁽¹⁾ And where the testator, being angry with one of the devisees, began to tear his will with the intention of destroying it, and having torn it in four pieces, was prevented from proceeding further, partly by the efforts of a by-stander, who held his arms, and partly by the entreaties of the devisee, and then becoming calm put by the several pieces, and expressed his satisfaction that no material part of the will had been injured, it was left to the jury to say, whether he had completely finished all that he intended to do for the purpose of destroying the will, and the jury having found that he had not, the Court refused to disturb the verdict.⁽²⁾

Ch. XIV. s. 3.
Implied
revocation.

(1) Hyde v. Hyde, 1 Eq. Cas. Abr. 409.
Short dem. Gastrell v. Smith, 4 East, 419.

(2) Doe dem. Perkes v. Perkes, 3 B. & A. 489.

In like manner, where intending to add new trustees and bequests, the testator obliterated the name of one trustee, and introduced another, without altering the general purposes of the trust, but did not republish his will, so as to give efficacy to it as a new devise, the Court were inclined to be of opinion that the whole will remained unaltered; but they determined, that at most it was a revocation *pro tanto* only, and did not totally destroy the will.⁽³⁾

(3) Vide Larkin v. Larkin, 3 Bos. & Pul. 16, 109.

On the other hand, if it plainly appear that the testator intended to cancel the will, and did any act towards such cancellation, though its destruction was not completed, it will amount to a revocation; and, therefore, where a testator, (having often declared himself dissatisfied with his will,) being in bed near the fire, ordered a person who was in the room to fetch it, and, after looking at it, gave it a rent, and threw it on the fire, from whence it fell, but would have been burned had not the person,

be lost or mislaid, in which case parol evidence is admissible to prove its contents. *Legare v. Ash*, 1 Bay's Rep. 464.

The testator made a will thereby expressly revoking a former will, and afterwards destroyed his subsequent will with an intention thereby to give effect to a former will, and died; the first will was held to be valid. *Linginfetter v. Linginfetter*, *Hardin's Rep.* 119.

The testator made a will and subjoined thereto a codicil; he afterwards made a second will and annexed a *postscript* to it, by which he "*revoked all former wills*" and signed the *postscript*; he then cancelled the second will by cutting his name out of it, but leaving the *postscript* with his name to it; this *postscript* and first will were preserved by the testator and found after his death; it was held that the *postscript* to the second will was a substantive revocation of the first will, and that cancelling the first will did not necessarily cancel the *postscript* also, so as to set up the first as the will of the testator. *Bates v. Holman*, 3 H. & Munf. Rep. 509.

Parol evidence is admissible in such cases to shew the situation of the testator, and the *quo animo* the cancelling was made. *ibid.*

The ground on which some of the earlier cases, which determined this alteration of circumstances to be a revocation, proceeded, was an implied intention in the testator *subsequent* to making the will to revoke it; and as this was a presumption of law, it was permitted to rebut it by evidence of declarations made by the testator, which shewed a contrary intention; but since it has been put on the other ground of a condition annexed to the will at the time of making, on which ground alone the revocation in favour of a posthumous child, when the testator did not know of his wife's pregnancy, can be supported; it may be much doubted, whether such evidence can be received, in the case of a will of lands. In the last case which came before the Court, the Judges cautiously abstained from giving any opinion on this point.

Ch. XIV. s. 3.
Implied
revocation.

Vide ante,
190, &c.
Logg v. Logg,
Ld. Raym.
441.

Vide 2 East,
543.

A will may also be shewn to be revoked, by any change of the testator's estate in the lands devised, as if he take a new estate in them after making the will. This does not at all depend on any intention of the testator; on the contrary, where he does an act for the very purpose of making his estate more perfect, and his will more firm, yet, if by that act he acquires a new estate, his will is revoked, or rather never operates on the estate since acquired, any more than it would on any lands subsequently purchased. In these cases the heir-at-law must prove the alteration of the estate by regular evidence of the different documents, whereby it was effected.

See the cases
on this point,
collected
1 Will. Sannd.
277, note (4).

Having thus shewn how a will may be proved by the heir-at-law to have been defeated, it will be proper, before we close the chapter, to say a few words on the nature and effect of republication; the proof of which will, in some cases, extend the operation of a will to lands not otherwise affected by it; and, in others, restore its powers after a revocation, provided it was not actually obliterated or destroyed.(u)

Republica-
tion.

plied revocation of a will, if the testator have not since these events took place republished his will, or signified an intention that it should stand. *Wilcox v. Rootes*, et al. 1 Wash. Rep. 175. Vide *Yerby v. Yerby*, 3 Call's Rep. 334.

Circumstances may be proved to rebut the presumption of an implied revocation. *ibid.*

In *North Carolina*, before the Act of 1808, the birth of a child before the making of a will, did not amount to a revocation of it. *M' Coy v. M' Coy*, 1 *Murphey's Rep.* 447.

Where a tract of land is devised, and the testator after the making of the will sells it, such sale does not amount to a revocation in law, so as to prevent the probate of the will. *M' Rainey v. Clark*, 1 *Tayl. T. Rep.* 278.—AM. Eo.

Republication of will.

(u) Any circumstance plainly indicative of the satisfaction of testator with the paper

From this rule, which requires the will to be republished and attested in the same manner as was necessary to constitute an original will, it follows, that all parol evidence of an expressed intention that the will should stand, is inadmissible in this case.

Ch. XIV. s. 3.
Republishing
of the will.

There is a distinction, however, to be made between a will which is actually and formally revoked, and one which is only revoked by the circumstance of another will being subsequently made. In the latter case, we have before seen that the new will does not revoke the old one, unless it be itself a perfect instrument; and, on the same principle that it was so determined, it has been also holden, that if a man, having made two wills, keep them both by him uncancelled, and afterwards cancel the last, this of itself operates as a republication, or rather as a restoration of the old will, so partially and conditionally revoked, without any formal act of republication (1) but had the first will been actually cancelled, when the second was made, the subsequent destruction of the second will would not, of itself, have restored the operation of the first. (2)

(1) Goodright
Jerm. Glazin
v. Glazin, 4
Barr. 2512.
(2) Burton-
shaw v. Gil-
bert, Cowp.
49.

SECTION IV.

Of the evidence in an action against an heir or devisee, on the speciality of his ancestor or testator.

THOUGH a man's executors are bound for all debts due from him, yet an heir is only bound by judgments against him, or debts secured by recognisance or bond under seal, in which the heir is particularly named.

Sec. 4.
Action against
heir on
specialty.

I do not deem it necessary to say any thing here respecting the proceedings on a judgment obtained against the ancestor, or recognisance entered into by him, further than that the proceeding being rather against the land than the person of the heir, the principal point to be established, on a *scire facias* against the heir or terre-tenants, will be the seisin of the ancestor at the time of or subsequent to the judgment or recognisance; and that

sence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give validity to the will. *Dunlap et al. v. Dunlap et al.* 4 Derauss. Rep. 305.—AM. ED.

heir of *A.*, for *B.* and *D.* being both seised of only an estate-tail, *C.* took the estate in fee immediately from his father. (1)

Ch. XIV. s. 4.
Action against
heir on
specialty.

To prove seisin and descent, the fact of the obligor being in possession, or receipt of rent, and that the defendant succeeded him, will be *prima facie* evidence, and will cast the burthen on the defendant of accounting for it by some other title.

(1) *Killow v. Roden, Carth.* 126.

This he may do by shewing that the obligor had mortgaged the land *in fee*, (2) that the estate was copyhold, (3) that the obligor had only an estate-tail, (4) or a reversion expectant on such an estate in another, (5) which, though it would be assets should the estate-tail become extinct, is not so during its continuance, the tenant in tail having the power of barring it. (6) But where the obligor is seised of a reversion in fee, expectant on a mere *life estate*; (7)* or where there is a mortgage for only a *term of years*, (8) such estates are considered assets, and the plaintiff will, on this plea, recover in his action, though he may not be able to obtain execution, at law, against the land of the obligor, during the continuance of the particular estate or term. (9) An advowson in fee, in gross, is also considered as assets, (10) as is a rent in fee out of land before belonging to the heir, though the rent becomes extinct by the descent. (11) Before the Statute of Frauds, (22 *Car. 2, c. 3.*) estates *per autre vie* were not considered as assets; but, by that Statute (sect. 12,) they are made so when they descend to the heir as special occupant; the Statute, however, (sect. 11,) provides that the heir in such case shall not, by reason of any kind of plea, be chargeable to pay the condemnation out of his own estate, but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased, in the same manner as it is to be at and by the common law, where the heir pleads a true plea.

(2) *Plunket v. Pearson,* 2 *Atk.* 294.

(3) 4 *Co.* 92, a.

(4) 1 *Roll.* Ab. 969.

(5) *Killow v. Roden, Carth.* 129.

(6) *Ibid.* *Kinaston v. Clark,* 2 *Atk.* 304.

(7) *Ibid.*

(8) *Plunket v. Pearson,* ub. supra.

(9) *Vide Doe d. Da Costa v. Wharton,* 8 *T. Rep.* 2.

(10) *Co. Lit.* 374, b.

(11) *Ibid.*

(12) *Plowd.* 545.

(13) *Anon. Cro. Eliz.* 421.

* The defendant might plead this descent specially, and then at the common law the plaintiff could only have judgment of assets, *quando, &c.* *Vide Killow v. Roden, Carth.* 129. *Smith v. Angel,* 2 *Id. Raym.* 784.

the former debt, as to which it may be sufficient to refer to observations already made in treating of actions against executors. It may, however, be here observed, that as a judgment not docketed is not binding on heirs, the plaintiff may, in case the defendant pleads a judgment outstanding against the obligor reply it was not docketed.⁽¹⁾

Ch. XIV. s. 4.
Action against
heir and
devisees.

(1) Steele v.
Rooke, 1 Bos.
& Pul. 307.

Having thus considered at some length the action which the common law gives against the *heir*, it will not be necessary to be very minute in treating of the action given by the Statute of the 3 & 4 Will. & Ma. c. 14, which was made to extend the benefits of that action to cases where it would be defeated by the devise of the debtor.

That Statute (sect. 2.) makes all devises or appointments of lands, rents, profits, term, or charge out of the same, whereof the testator is seised in fee-simple, in possession, reversion or remainder, or has power to dispose of the same by his last will and testament, fraudulent and void as against bond or specialty creditors; and (sect. 3.) enacts, that, in such case, every such creditor may maintain his action of debt on his bond and specialty against the *heir-at-law* of the obligor, and his *devisee or devisees jointly*; and that the devisee or devisees shall be liable and chargeable for a false plea in the same manner as any heir-at-law should have been for any false plea, and for not confessing the lands or tenements to him descended; and (sect. 7.) that the devisee shall be liable in the same manner as the heir-at-law, notwithstanding the lands devised to him shall be aliened before the action brought.

Devises or charges for payment of any real or just debt or debts, or any portions or sums of money for children, other than the heir-at-law, according to or in pursuance of any marriage contract or agreement in writing, *bona fide* made before the marriage, (by sect. 4.) are saved and declared to be in full force.

In this case, we have seen the action must be against the heir and devisee jointly; and on an action so framed, unless the devisees deny the devise, the plaintiff's evidence will be of the same nature in general as that before directed in the case of an action against the heir.

In the construction of this Act it has been holden, that an estate *per autre vie* is within it,⁽²⁾ and that the proviso contained in the 4th section operates in favour of all devises for payment of debts, though out of the rents and profits only.⁽³⁾ In case of such devise being so complicated as not to be capable of being carried into effect, a Court of Equity would (as in many of the other cases before mentioned) grant relief, but a Court of Law could not take notice of the defect.⁽⁴⁾

(2) Westfalling v. Westfalling, 3 Atk. 465.

(3) Planket v. Penson, 2 Atk. 292.

(4) Hughes v. Dolben, 2 Bro. 614.

CHAP. XV.

OF THE EVIDENCE IN ACTIONS AGAINST OFFICERS OF JUSTICE.

SECTION I.

Against Sheriffs, Bailiffs, and Gaolers.

Part II.
Sect. I.
Actions
against offi-
cers.

OFFICERS of justice are often liable to actions for irregular conduct in their official stations, and in most of these cases the evidence materially differs from that in actions against common persons. (a)

If trespass or trover be brought against a *bailiff*, for any thing done by himself, the evidence will be the same as against any other person; but as the *Sheriff* seldom does any act in per-

(a) The mistake in the addition of *place* is not a ground for sustaining an action of trespass against an officer who serves an execution issued on such judgment. *Smith v. Bowker*, 1 *Mass. Rep.* 76.

If a Sheriff having seized any goods on an execution or warrant of distress, sell them without giving the notice required by law, he is a trespasser *ab initio*, and as such is liable to the owner of the goods. *Furrington v. Loring*, 7 *Mass. Rep.* 388. *Winslow v. Same*, *ibid.* 392.

No action will lie against an officer for not returning an execution after the same is paid, and no special damage alleged. *Libret v. Child*, 1 *Root's Rep.* 264.

If the Sheriff, in executing a writ of *habere facias possessionem* against a man, turn the wrong person out of possession, the Court will grant relief, and award restitution. *Ex parte Reynolds*, 1 *Caines' Rep.* 500.

An action of *trespass*, and not *case* lies against a Sheriff who serves an execution after it has expired. *Vail v. Lewis et al. & Johns*, *Rep.* 450.

Trespass will lie against the Sheriff for the act of his deputy. *Estes v. Williams*, *Cooke's Rep.* 418.

An action *on the case*, (and not debt,) will lie against a Sheriff for not paying to landlord a year's rent due from his tenant, against whom the Sheriff had levied an execution. *Byrd v. Cocke*, 1 *Wash. Rep.* 297. *S. P. Governor v. Edwards*, 4 *Bibb's Rep.* 219.

An action of *assumpsit* will lie against a Sheriff for the amount of money received on an execution, but the *narr.* ought to be sufficiently special to apprise the defendant of the nature of the action. *Overton et ux. v. Hudson exr.* 2 *Wash. Rep.* 222. *Ioom v. Johns*, 2 *Munf. Rep.* 272. *Chichester v. Vase*, 1 *Call's Rep.* 99.

A Sheriff is liable to the action of the party at common law, for not executing and returning the process of the Court.

As to an action against a *deputy* by his *principal*, vide *Halcumb v. Flourney*, 2 *Call's Rep.* 433. *Renald v. Bentley et al.* 4 *H. & Munf. Rep.* 461.—AM. ED.

son, he must be connected with the *bailiff*, before the acts of the latter can be evidence to charge his superior. In this case, therefore, the plaintiff must first give in evidence the warrant of the defendant, either by calling the bailiff to produce it, or else by proving that it has been returned to the Sheriff's office; and then, after proving notice to produce it, a copy or parol evidence may be given of it.* To obtain this evidence, it will be necessary to serve the bailiff with a *subpœna duces tecum*, or common *subpœna*, accompanied with a notice, as well as to give notice to the Sheriff. Proof that the person who committed the trespass was the general bailiff of the defendant, and had given a bond of indemnity to him, will not be sufficient to connect him with the particular transaction.(1)(b) The foundation being thus laid, the Sheriff is civilly answerable for all the acts of his bailiff, and proof that he seized the person or goods of *A.* under an execution against *B.* will support the action against the Sheriff;(2) for though the authority has not been strictly followed by the bailiff, yet when once the Sheriff has constituted him bailiff for that particular service, he is civilly answerable for all trespasses or mistakes committed by the bailiff in the supposed or pretended execution of it.(c)

Ch. XV. s. 1.
Trespass
against Sheriff
for taking
goods.

(1) *Drake v. Sykes, Bart.*
7 T. Rep. 113.

(2) *Sanderson v. Baker,*
2 Black. 332.
Ackworth v. Kempe,
Doug. 40.

* This is the only regular evidence of a warrant; but, in some instances, where the original writ has been produced, and the name of the officer has been endorsed thereon by a person in the Sheriff's office, this has been deemed sufficient. See *Blach v. Archer, Comp.* 63; and *McNeil v. Perchard, 1 Esp.* 263.

The *Nisi Prius* decisions of different Judges on this point, however, have been by no means uniform; but all seem to have agreed that the name of a particular officer being endorsed on the writ is not sufficient proof of such officer having been duly authorized to act under it without clear evidence that such endorsement was made by the under Sheriff, or some person ordinarily employed in his office to grant warrants or writs, and for the purpose of denoting that a warrant was granted to the officer so named. In some of the cases the point has been raised on an office copy of the writ being produced, but it should seem that this secondary evidence could only arise on the production of the writ itself, when the hand writing itself could be spoken to. The reader who wishes to consult the cases, is referred to *Martin v. Bell, 1 Stark.* 413. *Hill v. Leigh, 1 Holt,* 316. *Morgan v. Bridges, 2 Stark.* 314. *Tealby v. Gascoigne, 2 Stark.* 902. *Hill v. Sheriff of Middlesex, 7 Taunt.* 8.

As to declarations or acknowledgments of the under Sheriff or bailiff, they do not seem to be admissible, except as part of the act done by them at the time. Vide ante, 39.

(b) The return of a person styling himself deputy Sheriff, is not evidence against the principal, unless it be shewn that such person is deputy Sheriff. *Slaughter v. Barnes, 3 Marsh. Rep.* 413.—*Am. Ed.*

(c) In *Massachusetts*, an action of trespass *vi et armis*, lies against a Sheriff, for the act of the deputy. *Grinnell v. Phillips, 1 Mass. Rep.* 530.

fraudulent and void, as against such creditor;(e) but in order to make it appear that he stands in that relation, the defendant must prove a copy of the judgment as well as of the execution; but had the party, against whom the writ issued, been plaintiff, a copy of the writ only would have been sufficient(1)(f)

Trespass
against Sheriff
for taking
goods.
Fraudulent
assignment.

These cases have arisen upon the Statute 13 Eliz. c. 5, which enacts, "that all and every feoffment, grant, alienation, bargain and conveyance of lands and tenements, hereditaments, goods and chattels, by writing or otherwise, and all and every bond, suit, judgment and execution had and made for any intent or purpose before declared, (viz. to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, &c.) shall be taken (only against them whose action, &c. by such covenous practice is disturbed, delayed or defrauded,) to be void;

(1) *Martin v. Podger*, 5 Burr. 2431.

The general rule, with regard to the assignment of personal chattels, is, that where the deed contains an absolute immediate assignment, it is necessary that possession should accompany and follow it, both at common law, and under the Stat. 13 Eliz. *Wilt v. Franklin*, 1 Binn. Rep. 521. *Dawes v. Cope*, 4 Do. 253. *Wager v. Miller*, 4 Serg. & R. Rep. 123. *Clow v. Woods*, 5 Do. 278. Et vide *Craft v. Arther*, 3 Dessaus. Rep. 229. *S. P. Hodges v. Blount*, 1 Huyw. Rep. 414. *Inglis v. Donaldson*, 2 Do. 57. *Vick v. Keys*, *ibid.* 138.

The not taking possession immediately of goods conveyed by a bill of sale, is not of itself fraud, but evidence only of fraud, and may be accounted for by evidence. *Falkner v. Perkins*, *ibid.* 224.

When fraud will be presumed. *Den ex d. Bell v. Hill*, 1 Hayw. Rep. 95. *Cox v. Jackson*, *ibid.* 423.

Whether trespass will lie against a constable, by a third person whose property was taken in execution on a warrant against one who had possession of the property? *Hall v. Moor*, *Addis. Rep.* 376.—AM. ED.

(e) Conveyances made to defeat creditors, are void by the common law, as well as by Statute. *Sands et al. v. Cadwise et al.* 4 Johns. Rep. 536.

Fraud is a question of law, especially where there is no dispute about facts; it is the judgment of law on facts. *Sturtevant v. Ballard*, 9 Johns. Rep. 337. Sed vide *Smith v. Niel*, *Hawk's Rep.* 241. *Trotter v. Howard*, *ibid.* 390.—AM. ED.

(f) In an action of trespass by a stranger against a Sheriff for seizing goods under a writ of *fieri facias*, the Sheriff in order to justify must produce the judgment as well as the writ. *Hugh v. Wilson*, 2 Johns. Rep. 46.

But if the Court be satisfied there was fraud, and that the plaintiff is not entitled to recover, they will not award a new trial after a verdict for the defendant, though the record of the judgment should not have been produced at the trial. *ibid.*

In a similar action brought by an officer, who had seized goods under an execution, against a third person for taking them away, it was held that the possession of the officer by virtue of the execution, was sufficient to enable him to maintain trespass or trover, and that proof of the seizure by virtue of the execution was sufficient, without producing the execution. *Barker v. Knapp*, 6 Johns. Rep. 195. Vide *Jenner v. Jolliffe*, *ibid.* 9.

An inquisition on a claim of property to goods taken in execution, is not a justification to the officer, but goes only in mitigation of damages. *Townsend v. Phillips*, 10 Johns. Rep. 98.—AM. ED.

to purchase goods, and at the same time take a bill of sale of Ch. XV. s. 1. them for securing the money ; here, the very intent of the transaction being that *B.* should have the possession, there is nothing fraudulent in such possession being continued by him.

Trespass
against Sheriff
for taking
goods.

So where *A.* being in debt, an execution issued against his goods, and they being put up to sale, a friend of *A.* became the purchaser, and took a bill of sale of the Sheriff, but permitted *A.* to continue in possession, who afterwards executed another bill of sale to *C.* another creditor under which he took possession, it was held that the first bill of sale was valid, and that the person to whom it was made might recover against *C.* the value of the goods sold by him. And in another case, where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods, and notice of the assignment being advertised in the public papers, the goods were afterwards sold by public auction, and the plaintiff having purchased them, removed some, but permitted his mother to remain in possession of the greatest part of them. It was also held, that this possession was not fraudulent, so as to entitle a creditor who did not come in under the deed to take them in execution. In these cases it will be seen that the transaction was open and notorious, and the possession was not inconsistent with the declared intention of the parties.*

Fraudulent
assignments.

Kidd v.
Rawlinson,
2 B. & P. 59.

Leonard v.
Baker, 1 M.
& S. 251; see
also *Deway*
v. Baynton,
6 East, 257.

negotiate and sell them for their advantage, and *Brewer's* keeping possession of them was not to give a false credit to him as in the other cases which had been cited, but for a particular purpose agreed upon at the time of the sale." Mr. J. BULLER had before observed, that "in cases where the possession was by the terms of the deed to remain in the vendor till a future time, or till some condition was performed, his continuance in possession until that time or until that condition was performed, was not fraudulent, because such possession was consistent with and accompanied and followed the deed;" and after citing the above case, added, "So that the Chancellor in that case proceeded on the distinction I have taken; he supported the deed because the want of possession was consistent with it." In the case of *Edwards v. Harben*, the bill of sale was absolute, and a formal possession was delivered, but the vendee verbally agreed that the vendor should remain in possession for fourteen days, and on account of this incongruity it was held to be void as against creditors.

* Many cases have occurred on settlements made between husband and wife; the most modern, and which, on account of its great importance in point of value was the most discussed, was that of *Deway v. Baynton*, 6 East, 257. The circumstances of that case are too complicated to admit of a mere abstract principle, but the case itself is too important to be passed over without reference. It is thus abridged by Mr. East: "One who had a life interest in a settled estate of his wife (both of whom were aged) of at least 3,000*l.* a-year, whereof the ultimate reversion on failure of issue male (of which there was none) was in her, and having furniture

riff is civilly liable to make amends to the party, is that of *ex-tortion*, which is punished by several Statutes. By the Stat. 29 *Eliz. c. 4*, certain fees are given to Sheriffs for levying *executions*; and by the 32 *Geo. 2, c. 28*, various other provisions are made to prevent the oppression of indigent defendants by the rapacity of bailiffs. If a bailiff offend against the Statutes, the party injured has his election either to sue him or the Sheriff, (1) but he cannot recover penalties against both for the same offence. (2) If he sue the Sheriff, he must in general prove the writ, warrant, and misconduct of the bailiff: but if the Sheriff has returned the writ, and the extortion appear on the face of his return, the warrant is unnecessary.* The same evidence should be given in the action against the bailiff. One of the offences enumerated in the latter Act of Parliament, is taking more than by law is allowed for waiting till bail is given, for which a penalty of fifty pounds is inflicted; but it has been holden, that no action can be maintained for this offence, without proving a regular table of fees, settled in pursuance of that Act, which, I believe, has never yet been done. (3)

For *false return of mesne process*, the declaration generally states the plaintiff's cause of action; that a writ issued and delivered to the defendant, and that the defendant either did take the debtor, and afterwards permitted him to escape; or else that he might have taken him, but did not, and returned *non est inventus*. (g) In this case, therefore, the first evidence will

Action for extortion.

(1) Woodgate v. Knatchbull, 2 T. Rep. 148.

(2) Peshall v. Layton and Marshall, ibid. 712.

(3) Jacques v. Whitcomb, 1 Esp. Cas. 361. Martin v. Slade, 2 Bos. & Pul. N. Rep. 59.

False return of mesne process

* If the judgment be stated in the declaration he must also prove that. *Savage v. Smith*, 2 Black. 1101.

(g) If a Sheriff sell goods upon an execution, without legally advertising the sale, he is liable to an action on the case for a false return, but not in an action of trover brought by the judgment. *Creditors of Livermore v. Bayley*, 3 Mass. Rep. 487.

An action on the case for a false return will lie against an officer who had an opportunity to levy an execution in his hands, on the body or property of the debtor, and did not do so; and in such a case the return of *nulla* and *non est inventus* would be a false return. *Frost v. Dugul*, 1 Day's Rep. 128.

In debt on replevin bond, evidence is not admissible to contradict the Sheriff's return of *elongatur*. *Philips v. Hyde*, 1 Dall. Rep. 439.

Where the law requires the return of an officer to be in writing, the whole of the return must be in writing, and parol evidence will not be admitted to contradict or explain it. *Davis v. Maynard*, 9 Mass. Rep. 242. *Purrrington v. Loring*, 6 Do. 388. *Winslow v. Loring*, 7 Do. 392. *Weld v. Bartlett*, 10 Do. 470.

The return of a Sheriff upon a precept is conclusive evidence against any person of the facts returned, in any question as to the effect of it. *Bott v. Burnell*, 9 Do. 96. *Estabrook v. Hapgood exr.* 10 Do. 313. *Slayton v. The Inhab. of Chester*, 4 Do 478. *Bött v. Burnell*, 11 Do. 163.

When goods sufficient to cover the debt, &c. are levied upon, the defendant is

or in improper custody *after the return of the writ*,⁽¹⁾ that no bail above was put in, and that by these circumstances he has been injured; for where a Sheriff's officer kept a defendant in his cus-

Ch. XV. s. 1.
Escape on
mesne pro-
cess.

Where the *first* execution was levied on wheat growing, and before it became ripe or was sold, a *second* execution was levied, it was held that the *first* execution retained its priority. *Whipple v. Foot*, 2 *Johns. Rep.* 418.

(1) 2 *Bla.*
1048. Vide
Atkinson v.
Mattenon,
2 *T. Rep.* 172.

The purchaser succeeds to all the interest of the original lessee in the crop sown. *Stewart v. Doughty et al.* 9 *Johns. Rep.* 108.

Bank shares and shares in a public library cannot be seized and sold under an execution. *ibid.*

An equity of redemption may be seized and sold under a *feri facias*, against a mortgagor in possession. *Waters et al. v. Stewart*, 1 *N. York Cas. in Er.* 47.

Contra in *N. Carolina*. *Allison v. Gregory*, 1 *Murph. Rep.* 333.

And in *Kentucky*. *Thomas v. Marshal*, *Hardin's Rep.* 19.

In *Pennsylvania*, under the Act of 1705, (1 *Sm. L.* 57,) all possible titles, contingent or otherwise, in lands where there is a real interest, may be taken in execution. *Humphrey's les. v. Humphreys*, 1 *Yeates' Rep.* 427. *Hurst v. Lithgow*, 2 *Do.* 24.

An action on the case, will lie for levying but *part* of the debt where there were goods for the *whole*. *Maccubbin v. Thornton*, 1 *H. & M. Ben. Rep.* 194.

Where a defendant in execution, and admitted to the liberties of the gaol, walked beyond the limits knowingly and voluntarily on pretence of avoiding a bank of snow which obstructed his usual walk, it was held to be an escape, and the Sheriff liable therefor. *Bissell v. Kip*, 5 *Johns. Rep.* 89. Vide *Tillman v. Lansing*, 4 *Johns. Rep.* 45. *Peters v. Henry*, 6 *Johns. Rep.* 121, on the same subject.

Where a defendant inadvertently and without any intention to escape, went to a house supposed to be within the limits, but which was really out of the limits, it was still held to be an escape. *Bissell v. Kip*, 5 *Johns. Rep.* 89.

Contra. *Jansen v. Hilton*, 10 *Johns. Rep.* 549. *S. P. Bary et al. v. Mandellet al.* *ibid.* 563.

A voluntary return before suit is brought, is not a defence in an action for an escape, whether negligent or voluntary, on *mesne* process, after the return of the writ. *Stone v. Woods*, 5 *Johns. Rep.* 182.

If the Sheriff, after an arrest on *mesne* process, have the body of the defendant at the return day of the writ, it is sufficient. *ibid.*

Where a constable, after having arrested a defendant on a warrant, issued by a justice of the peace, let him go on his promise to follow, and afterwards on the constable's going back to take him, he is prevented in consequence of the defendant being arrested by the Sheriff on other process, it is an escape. *Olmstead v. Raymond*, 6 *Johns. Rep.* 62.

In *Connecticut*, a prisoner, who escapes on an execution, may be retaken at any place. *Howard v. Lyon*, 1 *Root's Rep.* 107. *Abel, Sheriff v. Byvank*, 2 *Do.* 174.

A voluntary return of a prisoner, after an escape, is equivalent to a recaption, on fresh pursuit, and if before action brought, will excuse the Sheriff. *Drake et al. v. Chester*, 2 *Con. Rep.* 473.

After a *voluntary* escape by a defendant in execution, the Sheriff cannot afterwards retake or detain him, without a new authority from the plaintiff. *Lansing v. Fleet*, 2 *Johns. Cas.* 3.

Nor will the voluntary return or assent of the prisoner prevent his liability for the escape. *ibid.*

But on a *negligent* escape, the Sheriff may lawfully retake or detain the defendant. *ibid.*

So, if a person surrendered by his bail, and who has not been charged in execution, escapes, *debt* will not lie. *ibid.*

the Sheriff must not proceed to sell, though he had in fact levied the goods. Here also the Sheriff must return *nulla bona*, and give evidence of the different facts necessary to support the commission, viz. the trading, act of bankruptcy, &c.(i)

Ch. XV. s. 1.
Action for escape of one in execution.

Where the action is brought against a Sheriff for the escape of one in execution, the plaintiff may declare in debt; and if the Sheriff, having returned *cepi corpus*, afterwards permitted the defendant to escape, the plaintiff must prove copies of the judgment, writ, and return.(k) But if the escape were from the bai-

(i) Where a judgment is recovered against a bankrupt, who has obtained his certificate, for a debt due before the bankruptcy, and execution is delivered to the Sheriff who neglects to serve it, the creditor will recover only nominal damages. *Selfridge v. Lithgow*, 2 Mass. Rep. 374. See vide *Governer v. Matlock*, 1 Hawk's Rep. 425.

If an officer delay to serve a writ delivered to him, and by reason of such delay any damage or loss accrue to the creditor, the officer is answerable for it. *Barnard et al. v. Ward*, 9 Mass. Rep. 260.—AN EN.

Action for escape.

(k) Where an action against a Sheriff arises partly from a matter of record, and partly from matter *in pais*, in different counties, the plaintiff may bring his action in either county. *Marshall v. Hooper*, 3 Mass. Rep. 23.

Whether, in an escape from prison in one county from an execution founded on a judgment obtained in another county, be not such a substratum as makes the action local where the judgment is not recorded, or whether the county where the escape happens, be not the proper county for the venue? *Bogert et al. v. Hildreth*, 1 Caines' Rep. 1.

If the Sheriff permit a debtor who has been surrendered by his bail, in a civil action, and by the Court committed to the custody of the Sheriff, to go at large, before the expiration of thirty years, he will be chargeable for an escape, though he were not furnished with a copy of the order of Court committing such debtor. *Randall v. Bridge*, 2 Mass. Rep. 549.

If a defendant in execution, upon bonds goes out of the limits without the knowledge of the Sheriff, it is a negligent escape. *Jones v. Sheriff Abbe*, 1 Root's Rep. 106. *Abel v. Bennet*, *ibid.* 127.

The nominal plaintiff in ejectment cannot maintain an action against a Sheriff for the escape of the defendant committed for the damages and costs recovered in the ejectment. *Chipman v. Sawyer*, 2 Tyl. Rep. 61.

A Sheriff as keeper of the prison, to which is committed a debtor from another county, is not liable for the negligent escape of such debtor. *ibid.*

An action of debt will not lie against the administrators of a Sheriff for an escape in the life-time of the intestate. *Martin v. Bradley et al.* 1 Caines' Rep. 194.

If a coroner, having an execution against a deputy gaoler, arrest him, and the Sheriff be not at the goal, nor any keeper authorised by him, the coroner by leaving his prisoner at the goal is discharged, and the Sheriff suffering him to go at large, is guilty of an escape. *Colby v. Sampson*, 5 Mass. Rep. 310.

An action of the case on debt lies against an officer, for an escape, whether negligent or voluntary. *Colby v. Sampson*, 5 Mass. Rep. 310. *Appleby v. Clark*, 10 Do. 59.

It is not an escape for a Sheriff to bring up on a *habeas corpus ad testificandum*

which, in cases of *execution*, it should seem, can only be done by Ch. XV. s. 1. proving an examined copy of the *committitur* entered of record; but where the debtor is committed on a *habeas corpus* charged with *mesne process*, the production of the *habeas corpus* itself, with the Judge's commitment annexed to it, is sufficient evidence of such commitment, it being also proved that notice of it was given to the defendant by entering a memorandum of it in the book kept by him for that purpose. Action for escape of one in execution. Watson v. Sutton, Salk. 272.

When a defendant is in custody of the marshal, and is to be charged with a King's Bench execution, a rule is obtained for the marshal to acknowledge the defendant to be in his custody, and he is committed upon such acknowledgment. In this case, therefore, it would be proper to prove such acknowledgment on the trial; but if he be in custody of the warden of the Fleet, and is to be charged with a Common Pleas or Exchequer writ, a *habeas corpus* is obtained, the return to which proves the fact of his being in custody.

Having thus established the fact of the prisoner being in the defendant's custody, the plaintiff must next prove the escape from it, by evidence of the debtor having been afterwards seen at large; and in this case, whether his escape were before or after the return of the writ, the Sheriff is equally liable to an action. He cannot permit him to be out of his own custody for a moment, and even where after the arrest the bailiff suffered the defendant to go about on two different days, in company with his follower, for the purpose of enabling him to settle his affairs, it was holden to be an escape. (1) So where a bailiff of a liberty having arrested the defendant, delivered him into the County gaol, this was determined to be an escape. (2) The evidence of the escape, as well as that of the custody, is rendered much more easy by the before-mentioned Statute of 8 & 9 Will. 3, which enacts, "That if the marshal or warden, or their deputies, or the keeper of any prison, after one day's notice in writing for that purpose, shall refuse to shew a prisoner committed in execution, to the creditor or his attorney, such refusal shall be adjudged an escape." Hawkins v. Plomer, 2 Blos. 1048. (1) Benton v. Sutton, 1 Bos. & Pul. 24. Ibid. (2) Boothman v. Earl of Surrey, 2 T. Rep. 5. 8 & 9 W. 3. c. 27, s. 8.

The defendant may put the plaintiff to the proof of all these facts by the plea of *nil debet*. He may also plead that the escape was against his will, and that he made fresh pursuit and retook the prisoner before the commencement of the plaintiff's action; but before such plea is received, affidavit must be made by the gaoler that the prisoner escaped without his consent or privity. This plea may be pleaded to an action charging a *vo-*

Another injury which a person may sustain by the tortious or negligent act of the Sheriff or his deputies, and for which the law gives an action, is the taking insufficient sureties on granting a replevin of a distress for rent. The Statute 11 Geo. 2, c. 19, s. 23, enacts, that all Sheriffs and other officers, having authority to grant replevin, shall, in any replevin of a distress for rent, take from the plaintiff, and two *responsible persons*, as sureties, in their own names, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded.

For a neglect of duty in this particular, the Sheriff, undersheriff, and replevin clerk are all liable;(1) and a bailiff who makes cognisance may maintain the action, as well as a person who is the actual landlord.(2)

In order to sustain this action, the plaintiff should prove the several facts averred in his declaration; viz. the taking the distress, the replevin made, the bond, and the insufficiency of the sureties.

The replevin will be proved by the Sheriffs or replevin clerks; precept or warrant, as formerly directed when speaking of executions, &c.; and the bond by the subscribing witness. At one time slight evidence of the insufficiency of the sureties appears to have been considered sufficient;(3) but modern decisions have much narrowed the liability of Sheriffs in this particular; and it is now held, that if the sureties taken by the Sheriff are of apparent responsibility, he is not answerable to the landlord, though he neglected to inquire into their actual sufficiency,(4) so

Ch. XV. s. 1.
Action for
taking insuf-
ficient sure-
ties in reple-
vin.

(1) *Richards v. Aeton*, 2 Blac. 1220.

(2) *Page v. Eamer*, 1 B. & P. 378.

(3) *Saunders v. Darling*, Bul. N. P. 60.

(4) *Hindal v. Blades*, 5 Taunt. 225.

debt of the defendant becomes the debt of the Sheriff. *Smith v. Hart*, 2 Bay's Rep. 395.

In an action for an escape, and false return of *meane process* against a Sheriff, the plaintiff can recover no more than he could have recovered in the original action; nor ought he to recover more than he has actually lost in consequence of the escape. *Potter v. Lansing*, 1 Johns. Rep. 214.

If in an action for an escape, the defendant declares in *debt*, he can recover the amount of the judgment only, but if he declares on the case for damages, he may recover interest, and all he has lost by the escape. *Rawson v. Dole*, 2 Johns. Rep. 454.

In *Pennsylvania*, in an action of trespass against a Sheriff for the misconduct of his deputy, the jury may award *exemplary damages*. *Hazard v. Israel*, 1 Bin. Rep. 240.

However, in *Virginia*, in an action against a Sheriff for levying on wrong goods, the Court said the damages should not be *vindictive*, but merely *compensatory* for the loss sustained. *Anderson v. Fox*, 3 H. & Munf. Rep. 245.

In an action for a rescue of a defendant, it is incumbent on the plaintiff to prove his debt. *Law v. Arwater*, 2 Root's Rep. 72.—AN. ES.

Part II.
Action for
taking insuf-
ficient sure-
ties.

that some evidence should be adduced to shew either that the Sheriff or his officer actually knew of the insufficiency of the sureties ; or that their habits of life were so low, or their insolvency so notorious, as must necessarily have raised a suspicion of their sufficiency in his mind.

There have been some differences of opinion as to the extent of the Sheriff's liability in this case. The Court of King's Bench in two instances,(1) and the Common Pleas in one,(2) determined that he was only liable to the value of the goods distrained; but in another case, the latter Court held that he was liable to the extent of the penalty in the bond.

(1) *Gea v. Lethbridge*, 4 T. R. 433. *Wilkinson v. M'Cauley*, 1b.

(2) *Evans v. Brander*, 3 H. B. 547.

Action for
selling without
paying the
landlord's
rent.

On principles somewhat similar to the last, is the action founded on the Statute 8 *Anne*, c. 14, s. 1, which enacts, that no goods or chattels upon any messuages, lands, or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by virtue of an execution, on any pretence whatsoever, unless the party at whose suit the said execution is sued out, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises, or his bailiff, all such sums of money as are due for rent for the said premises at the time of such taking of the goods, provided the arrears of rent do not amount to more than one year's rent.

Vide ante, 458.

To support this action, the plaintiff must prove the demise as stated in the declaration, the levy made under the Sheriff's warrant, and that notice of the arrear was given to the Sheriff, under-sheriff, or bailiff,(3) and the value of the goods seized.

(3) *Smith v. Russell*, 3 Taunt. 400.

(4) *Hoskins v. Knight*, 1 M. & S. 245.

(5) *Gwillam v. Barker*, 1 Price, 274.

(6) *St. John's College v. Mureux*, 7 T. Rep. 259.

(7) *Henchet v. Kimpson*, 2 Wils. 140.

(8) *Bockley v. Taylor*, 2 T. Rep. 600.

(9) *Rex v. De Caux*, 2 Price, 17.

(10) *Lee v. Lopes*, 15 East, 230.

This will entitle him to the amount of a year's rent, provided the goods will extend so far, and so much were due at the time the levy was made, but not to any rent accruing due after the seizure, though while the Sheriff was in possession,(4) and this even in the case of a seizure of growing corn, which must necessarily remain on the premises to ripen.(5)

In regard to the species of execution against which the landlord is thus protected, it has been held that an outlawry in a civil suit,(6) an execution for the costs of a nonsuit,(7) and even a seizure under a commission of bankrupt,(8) are within the Statute ; but that the prerogative process of an extent in aid is not :(9) and though the plaintiff would be protected against the assignees of a bankrupt, yet if the Sheriff seize under an execution, and such execution is overhauled by a commission, the Sheriff will not be allowed to deduct the year's rent due to the landlord in an action by the assignees, unless he has actually paid it over before notice of the commission.(10)

SECTION II.

Against Justices, Constables, and Revenue Officers.

IN actions against officers of the criminal and revenue law, some previous steps are rendered necessary by the positive rules of several Acts of Parliament, which the plaintiff must be prepared with evidence to shew he has complied with.⁽ⁿ⁾ By Statute 21 *Jac.* 1, c. 12, actions against justices of peace, mayors, bailiffs, churchwardens, overseers of the poor, constables, and other peace officers, or persons acting in their assistance, or by their command, must be brought in the proper county. By Statute 7 *Jac.* 1, c. 5, (made perpetual by the other act) the defendant may give every thing in evidence on the general issue.* And, by 24 *Geo.* 2, c. 44, s. 1, no writ can be sued out against a justice for what he does in the execution of his office, till notice in writing of such intended writ has been delivered to him, or left at his usual place of abode, by the attorney or agent of the party who intends to sue, one calendar month before the suing out the same; in which notice must be contained the cause of action, and on the back of which must be endorsed the name and place of abode of such attorney or agent. By sect. 3, the plaintiff must be prepared to prove the notice on the trial: and, by sect. 5, he is precluded from giving evidence of any cause of action not contained in it.

Ch. XV. s. 2.
The Statutes
relating to
justices and
constables.

By the same Statute, (sect. 6.) no action can be brought against any constable, or any other person acting by his order, or in his aid, for any thing done in obedience to a justice's warrant, under hand and seal, until demand made or left at the usual place of his abode, by the party intending to bring such action,

(n) In *Pennsylvania*, vide Act 21st March, 1772, 1 Sm. L. 364, and the decisions thereon in *Kennedy v. Shoemaker*, 1 *Browne's Rep.* 61. *Mitchell v. Cowgill*, 4 *Binn. Rep.* 20. *Little v. Toland*, 6 *Do.* 83. *Slocum v. Perkins*, 3 *Serg. & R. Rep.* 295. *Prior v. Craig*, 5 *Do.* 44. *Jones v. Hughes et al.* *ibid.* 299. *Lake v. Shaw*, *ibid.* 517.—AM. Ed.

* By Statute 42 *Geo.* 3, c. 35, s. 6, the provisions of this Statute of 21 *Jac.* 1, are extended to persons holding, exercising, or being employed in any public employment, office, station, or capacity, either civil or military, either in or out of this kingdom, who have, by virtue of such public employment, office, &c. power to commit persons to safe custody, except that the plaintiff is permitted to state any thing done out of this kingdom to have been done at *Westminster*.

case only, that such acts were done maliciously, and without any reasonable or probable cause. Ch. XV. s. 2. The Statutes relating to justices and constables.

In cases where malice is thus alleged, it will be important to prove in evidence, not only the circumstances really attending the case of the plaintiff, but also what passed before the magistrate; for though the prosecution may have been wholly without foundation, yet the magistrate may have been blameless upon the evidence laid before him. Burley v. Bethune, 4 Taunt. 580.

And, by the second section of the same Act, it is enacted, that the plaintiff shall not be entitled to recover against such justice any penalty which shall have been levied, nor any damages or costs whatever, in case such justice shall prove at the trial that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence.

This Act of Parliament extends to all cases of convictions, whether a pecuniary penalty or a corporal punishment is inflicted; and if the party be duly convicted; the formal record of conviction may be drawn up any time before the trial of the action. Massey v. Johnson, 12 East, 67.

Officers of the *excise* (by 23 *Geo. 3, c. 70, s. 30, &c.*) and those of the *customs* (by 24 *Geo. 3, c. 47, s. 35.*) are protected by nearly the same regulations as were made by the previous Statutes in favour of justices. A month's notice* is to be given, which is to contain the cause of action, and the names and places of abode of the person who is to bring the action, and of his attorney or agent. The *venue* is confined to the proper County, and the defendant has the advantage of the general issue. In two respects only they differ from the others, both of which are more favourable to them, viz. the action must be brought within *three* months, and the defendant, in case of the plaintiff's failure, recovers *treble* costs. Revenue officers.

These Statutes have received the most liberal construction in favour of officers of justice. They extend to every case where a man acts *bona fide* in the supposed execution of his duty, though he has transgressed the rules of law, and was not authorised to do the act complained of. And even if one magistrate Heller v. Toke, 9 East, 365.

* The day on which the notice is given is included in the reckoning, and therefore if the notice be given on the 23rd *April*, the writ may be sued out on the 23rd *May*. Vide *Castle v. Burdett*, 3 *T. Rep.* 683.

were concealed in the plaintiff's house, directed the constable to search for and secure them, and the constable did seize sugar there, which, in fact, had not been stolen, it was holden that he

was entitled to notice, as having acted within the warrant. (1) And it should be observed, that though where the constable exceeds the authority given him by the warrant, he is not within the sixth section of the Statute, which requires a notice, yet that

he is so far within the protection of the Statute, as to make it necessary for the plaintiff to commence the action within six months, pursuant to the eighth section thereof. (2) Whether, when he acts without any warrant at all he is so protected, does not appear to be clearly settled. (3) It would probably be so held if the point were to be expressly raised, though a *nisi prius* decision of Lord KENYON is to be found to the contrary. (4)

Where a man sustains two characters, either of which entitles him to do an act, he may apply the act which he does to either of those characters, and claim the advantages of it; (5) and, therefore, where a Lord of a manor, who as such is entitled to seize the gun of an unqualified person, exercises that right, and he is also a justice of the peace within the county, no action is maintainable without notice, for the act will be referred to his authority as a justice.

Not only must the notice be given, but the form prescribed by the Legislature must be strictly followed; notice that an action will be commenced, is not sufficient; the nature of the *verdict* or *process* that is intended to be sued out must be particularly specified; (6) and though the plaintiff need not state the form of action he intends to adopt, but will satisfy the Statute by stating the cause of it, yet it has been said, that if he does state one form, and adopts another, the notice is invalid. (7) Thus, a notice of an intended action *on the case*, for false imprisonment and assault, has been determined not to be sufficient to enable

the plaintiff to give evidence on a declaration for *trespass* and false imprisonment. (8) We have seen that the Statute protecting justices, also requires the name and place of abode of the attorney or agent to be endorsed on the back of the notice. The surname, with the initial letter of the christian name, has been deemed a compliance with the Statute in this particular; (9) but if the place of abode be not directly stated, it is fatal. As where the attorney signed, "Given under my hand at *Durham*," the notice was holden to be bad, because this was not a direct allegation that he resided at that place; (10) but where the attorney signed his name, *W. S. of Birmingham*, it was deemed sufficient, though the particular street was not nam-

Ch. XV. s. 2.
Construction
of the Statutes.

(1) Price v.
Messenger.
2 Bos. & Pul.
158.

(2) Parton v.
Williams,
3 B. & A. 330.
Smith v.
Wiltshire,
2 Brod. & B.
619.

(3) Parton v.
Williams,
3 B. & A.
330; and 3
Esp. 226.

(4) Postle-
white v. Gib-
son, 3 Esp.
226.

(5) Briggs v.
Evelyn, Barr.
2 H. Blac.
214.

(6) Lovelace
v. Curry, 7
Rep. 631.

(7) Sorbin v.
De Burgh,
2 Camp. 197.

(8) Strickland
v. Ward,
7 T. Rep.
631, note (c.)
and 638, note
(a.) Sed qu.
vide 2 Bos.
& P. 552,
note.

(9) Mayhew
v. Locke,
7 Taunt. 63.

(10) Taylor
v. Fenwick,
3 Bos. & Pul.
553, note (a.)
and 7 T. Rep.
634.

condemnation before the commissioners did not conclude the plaintiff, yet, in an action against a justice it has been holden, (1) that if he prove his warrant, and conviction of the plaintiff of any offence within his jurisdiction, it will be conclusive evidence in his favour, till reversed or quashed, and that the propriety or justice of it cannot be controverted at *Nisi Prius*; nor can any evidence of facts not in proof before the justice be adduced to shew that the justice exceeded his jurisdiction; (2) but if the justice had no jurisdiction, or knowingly exceeded it, as where having convicted a man of one offence in exercising his ordinary calling on a Sunday, he afterwards convicted him of another such offence on the same day, which could not possibly be committed, the second conviction being absolutely void, an action lies at the suit of the party injured, without quashing it; (3) and the like decision took place where justices having summoned a late overseer to deliver up a particular book belonging to the parish, committed him, on his refusal to do so, until he should have delivered up all books belonging to the parish, such adjudication and commitment, beyond the terms of the original complaint, making the warrant void *in toto*. (4) It has been said, that in actions of this kind, the justice is obliged to shew the regularity of his proceedings, and that the informations, &c. upon which his conviction was founded, must be produced and proved in Court; (5) but it seems to be now clearly settled, that the conviction itself is sufficient when drawn up in form, though done immediately before the time of its production in Court. (6)

It may be proper to add, to what has been already said respecting these actions, that the justice may, by the Stat. 24 Geo. 3, c. 44, s. 2, and the excise and custom-house officers by the Statutes before alluded to, within one month after the notice, tender amends to the party, or to his agent or attorney, and in case it is not accepted, plead such tender in bar, together with the general issue; and if the jury find it to be sufficient, the defendant shall have a verdict; and if the justice or excise officer shall have neglected to have tendered any amends, or not tendered sufficient, he may, at any time before issue joined, pay such sum into Court as he shall see fit, whereupon such proceedings, &c. shall be had as in other cases where a defendant is permitted to pay money into Court.

Where the defendant pleads a tender, the plaintiff may either reply that there was no tender, or that the sum tendered was not sufficient; in the one case, the issue will be on the defendant; in the other, the evidence will be the same as if the cause had stood on the general issue.

Ch. XV. s. 2.
Defendant's
proof.

Conviction.

(1) Strickland
v. Ward, 7 T.
Rep. 633; 12
East, 75.

Gray v. Cook-
son, 16 East,
113.

(3) Brittain v.
Kinnaird,
1 Brod. &
Bing. 432.
Lowther v.
Earl of Rad-
nor, 8 East,
113.

(3) Cripps
v. Darden,
Cowp. 640.

(4) Groome
v. Forrester,
5 M. & S. 814.

(5) Hill v.
Bateman,
2 Stra. 710.

Tender of
amends.

(6) Vide
Massey v.
Johnson,
12 East, 67;
and the cases
of Strickland
v. Ward, and
Gray v. Cook-
son, ante, 454.

Part. II.
Construction
of the Statutes.
Notice.

(1) Osborne
v. Gough, 3
Bos. & Pul.
551.

Time of com-
mencing the
action.

(2) Williams
v. Burgess, 3
Taunt. 157.

(3) Wood v.
Folliot, 3 B.
& P. 552.

(4) Pickers-
gill v. Palmer,
Bul. N. P. 24.
Massey v.
Johnson,
12 East, 67.

(5) Godin
v. Ferris,
2 H. Blac. 14.

(6) Weston v.
Fournier,
14 East, 491.

(7) Ante, 456.

Defendant's
proof.
Conviction.

(8) Saloman
v. Gordon,
2 Black. 813.

(9) Henshaw
v. Plessance,
Ib. 1174.

(10) 23 Geo.
3, c. 71, s. 55.

(11) Scott
v. Shearman,
2 Black. 977.

ed ;(1) it being enough if the direction be so certain as to enable the defendant to make a tender. The Statutes for the protection of excise officers, require not only the name and place of abode of the attorney to be mentioned, but that of the party also, and therefore his place of abode at the time of giving the notice, as well as that at the time of the injury, must be mentioned in the notice ;(2) but if it describe two partners, one of *A.* and the other late of *A.* that is sufficient.(3)

The *general issue* being given in all these cases, the plaintiff should, in cases where the record does not shew the action to have been commenced within the time of limitation, be prepared with the writ to produce in Court, and if the defendant were not served with the first writ, it must be connected with the second, as was before directed in the instance of actions on penal Statutes. If the plaintiff be imprisoned for a length of time, he has six months from the end of his imprisonment to bring his action.(4) But it has been holden, that an action against a custom-house officer for seizing goods, must be brought within three months after the actual seizure, notwithstanding a suit instituted in the Exchequer for condemnation of the goods, which is depending at the expiration of the three months.(5) And in the other case, of a continuing cause of action, if the plaintiff give a notice, and thereby confine himself to the trespass therein mentioned, he must shew either that the writ, with which the defendant was served, issued within six months after the trespass mentioned in the notice,(6) or that it is a continuance of a writ sued out within that time ; the mode of shewing which has been before spoken of.(7) After this preliminary evidence, the plaintiff is at liberty to prove his trespass, as in other cases, either by shewing the act done by the defendant himself, or by the warrant in the case of a justice, and this *prima facie* case will in general call for an answer from the defendants, and throw the *onus probandi* upon them. Thus it has been holden, that where an action of trespass is brought against a custom house officer for seizing goods, it is incumbent on the defendant to shew that the duty has not been paid ;(8) and that even a condemnation of the goods before *commissioners of excise* will not dispense with the necessity of this evidence.(9) But, by a Statute since made, it is enacted, that, in such case, the proof of payment of the duties shall lay upon the plaintiff and not upon the officer.(10) If the officer prove a condemnation in the *Exchequer*, this is conclusive evidence that the property is vested in the King, and a complete bar to the action.(11) But though in the action against the *excise officer*, the Court decided that a

condemnation before the commissioners did not conclude the plaintiff, yet, in an action against a justice it has been holden, (1) that if he prove his warrant, and conviction of the plaintiff of any offence within his jurisdiction, it will be conclusive evidence in his favour, till reversed or quashed, and that the propriety or justice of it cannot be controverted at *Nisi Prius*; nor can any evidence of facts not in proof before the justice be adduced to shew that the justice exceeded his jurisdiction; (2) but if the justice had no jurisdiction, or knowingly exceeded it, as where having convicted a man of one offence in exercising his ordinary calling on a Sunday, he afterwards convicted him of another such offence on the same day, which could not possibly be committed, the second conviction being absolutely void, an action lies at the suit of the party injured, without quashing it; (3) and the like decision took place where justices having summoned a late overseer to deliver up a particular book belonging to the parish, committed him, on his refusal to do so, until he should have delivered up all books belonging to the parish, such adjudication and commitment, beyond the terms of the original complaint, making the warrant void *in toto*. (4) It has been said, that in actions of this kind, the justice is obliged to shew the regularity of his proceedings, and that the informations, &c. upon which his conviction was founded, must be produced and proved in Court; (5) but it seems to be now clearly settled, that the conviction itself is sufficient when drawn up in form, though done immediately before the time of its production in Court. (6)

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(1) Strickland
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Rep. 633; 12
East, 75.
Gray v. Cook-
son, 16 East,
13.

(2) Brittain v.
Kinnaird,
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nor, 8 East,
113.

(3) Cripps
v. Durden,
Cowp. 640.

(4) Groome
v. Forrester,
5 M. & S. 814.

(5) Hill v.
Bateman,
2 Stra. 710.

Tender of
amends.

(6) Vide
Massey v.
Johnson,
12 East, 67;
and the cases
of Strickland
v. Ward, and
Gray v. Cook-
son, ante, 434.

CHAP. XVI.

OF THE EVIDENCE IN ACTIONS BY AND AGAINST ECCLESIASTICAL
PERSONS.

SECTION I.

In actions by the Patron or Parson to try the title to, or obtain possession of the Church.

Part. II.
Quare impedit.

I. WHEN the title to present is disputed, and the bishop admits the clerk of one patron in preference to the other, or on account of the dispute refuses to admit either, the patron whose clerk is refused admission brings his *quare impedit* against the bishop, the other patron, and his clerk. In this action the pleadings are special; the declaration states the title of the plaintiff; that he is seised of a manor to which the advowson is *appendant*; or of the advowson itself *in gross*, as the case may be; that he, or those under whom he claims, have presented on a former occasion; that the clerk so presented has been instituted and inducted into the living; and that the church having become void, his right has been disturbed by the defendant. The defendant, viz. the other patron, (for the bishop and clerk usually disclaim any title,) sets out, in his plea, his own title, and concludes with a traverse of some fact in the declaration, generally the plaintiff's seisin of the manor, the appendancy of the advowson to it, or the plaintiff's seisin of the advowson in gross.

On pleadings so framed the plaintiff must be prepared with evidence to support his claim as stated in the declaration.* He must prove at least one presentation by himself, or those from whom he derives title, and that the clerk so presented was duly

* It has been usual to insert but one count in a declaration in *quare impedit*, and when the defendant could demandoyer of the original writ, and avail himself of any variance between that and the declaration, there might have been great difficulty in doing otherwise; but now thatoyer of the original writ cannot be obtained, there does not seem to be any objection to the plaintiff stating his title in a variety of ways so as the more certainly to avoid a variance between his pleading and his proof. In a very recent instance a declaration was so drawn, and no objection made to it. *Birch v. Bishop of Litchfield and Coventry*, 3 Bos. & Pul. 444.

instituted and inducted into the living. To shew this he should produce and prove, by the subscribing witnesses, the presentation and letters of institution, and also prove the induction by some witness present at the time,* or at least prove, that the person so instituted continued in peaceable possession of the church. If the letters of institution are lost, the bishop's register should be produced, and as a presentation may be by parol, that alone has been holden to be sufficient; and where a blank was left for the name of the patron parol evidence was received to shew who was the person actually presenting. In cases where there is reason to apprehend evidence of title in the defendant, it will be proper to prove as many instances of presentation as possible; for, as this is the only way of exercising the right, every instance gives additional strength to the title. But if the defendant merely plead the general issue, viz. that he did not disturb, the title does not come in question, and the plaintiff may either have judgment or go for damages by proving the disturbance, to shew which he must prove the presentation, the bishop's refusal, and the institution or presentation of the other clerk.

Ch. XVI. s. 1.
Quar. impedit.

Vide ante,
189.

Hob. 163.

The defendant, in cases where his clerk also has been refused admission, must not only be prepared with evidence to controvert the title of the plaintiff, and shew that the former presentation was an usurpation upon his right; but must also support his own title, by the like evidence as was necessary on the part of the plaintiff, because, in this case, both parties are actors, and if the verdict be found for the defendant, and his title established, he is entitled to have his clerk admitted.

Vaughan, 6.
Hob. 163

If the issue be upon the avoidance, the manner in which it is stated is not very material; an avoidance by the death of the last incumbent will support an allegation of an avoidance by privation; and if the allegation on the other hand be, that the church became void by his death, it may be shewn, that he has taken another living without the necessary dispensation, for the manner of the avoidance is not the title of the plaintiff, but the avoidance itself. In cases where the acceptance of another living is made the ground of the action, it must be proved, that the parson subscribed the thirty-nine articles upon his appointment to the second benefice, for unless he has so done, although instituted and inducted into it, he never became lawful parson of it; and therefore did not avoid the first, though the fact of his afterwards officiating as parson, would now probably be considered

Co. Lit. 282, a.

Dyer, 377. b.

Ibid.

Shute v. Higden, Vaughan
129.

† As to the manner of induction, and the different acts necessary to be done, see Burn's Ecclesiastical Law, tit. Benefice.

Part II. as evidence of his having so subscribed. (1) But if he has *subscribed*
 Quare impedi- ed the articles on his appointment to the second living, though
 dit. he may afterwards forfeit it, by not *reading* them within two
 months after his induction, yet the first living becomes void.

(1) Vide ante,

By the Stat. 36 Geo. 3, c. 83, s. 3, curacies augmented by Queen Anne's bounty, are to be considered as benefices presentative, so as that the license thereto shall operate in the same manner as institution to such benefices, and shall render voidable other livings in like manner, as institution to the said benefices. In case of the avoidance of the living, by the acceptance of *such* a curacy, it must be proved, that it has been in fact augmented. But to establish this fact, it will be sufficient to prove the order for the augmentation, entered in a book, signed by the governors, according to Stat. 1 Geo. 1, Stat. 5, c. 10, s. 20, without going on to prove that the money was afterwards laid out in land and allotted by deed, under the corporation seal of the governors, and that such deed was enrolled within six months after its execution, as required by the Act.

Doe dem.
 Graham v.
 Scott, 11
 East, 473.

Lit. Rep. 1.

In cases of this kind it may be necessary for the defendant to prove his dispensation as chaplain to some nobleman; and it should seem, that unless the retainer be lost, it should be proved like other instruments by the production and evidence of the subscribing witness; it has, however, been said, that the oath of any person who has seen the retainer under hand and seal is good; but that a copy of it, entered in the Court of Faculties, is not sufficient.

If the issue be proved for the plaintiff the jury should inquire, 1st. Whether the church be full, and if so, upon whose presentation; for if upon the defendant's presentation, the clerk is removeable. 2dly. The value of the living to enable them to assess damages according to the Statute of *Westminster*. 3dly. In case of plenarty upon an usurpation, whether six calendar months have passed between the times of the avoidance and bringing the action, for, if that time has passed, the case will not be within the Statute, which only permits a usurpation to be devested by a writ brought *infra tempus semestris*. These facts are seldom matters of dispute in the cause; but, unless admitted, the plaintiff should be prepared with evidence to ascertain them.

Ejectment.

II. Where the parson has been admitted, instituted, and inducted into the living, and any person afterwards keeps possession of the Parsonage house, or glebe, or continues to receive the tithes, *ejectment* is the proper remedy to recover the possession. In this action he must prove his admission, institution,

Snow dem.
 Crawley v.
 Phillips, 1
 Sid. 230.

and induction ; and it was formerly holden to be necessary for him to prove also that he had read and subscribed the thirty-nine articles, according to the Statute, and declared his assent and consent to all things contained in the Book of Common Prayer. Of this, however, he is not now compelled to give evidence, unless some ground be laid by the defendant to shew that he has not complied with these requisites ; for, the presumption is, that every man has conformed to the law, until there is some evidence to the contrary. Neither is the plaintiff obliged to prove any title in his patron, for institution and induction, though upon the presentation of a stranger, is sufficient to put the rightful patron to his *quare impedit*.

Ch. XVI. s. 1.
Ejectment.

Powell v. Millbank, 3 Wils. 355. 2 Blac. 351, S. C.

Vide Bal. N. P. 105.

SECTION II.

In actions for tithes.

WHERE the tithes have been taken by the defendant under an agreement and composition with the plaintiff, *assumpsit* on the contract is the proper remedy ; and no further evidence is necessary in this case than the occupation of the defendant, his contract with the plaintiff, and the retaining of his tithes in consequence of such contract.

Sect. 2.
Action for tithes.

But where there is no existing contract, and the farmer has neglected to set out his tithes, or has made a fraudulent and colourable severance, and then carried them away, the proper remedy for *predial* tithes, viz. corn, hay, and such like things, which arise immediately from the earth, is, by action of debt, founded on the Stat. of 2 & 3 Edw. 6, c. 13, which in such case, gives treble the value of the tithes withheld ; and when the single value found by the jury, does not exceed 20 nobles (6l. 13s. 4d.) the Stat. 8 & 9 W. 3, c. 11, gives the plaintiff his costs. But if the jury find the single value above that sum, or an arbitrator awards even less, or the plaintiff declaring for less the defendant suffers judgment by default, so that the value is not "found by the jury," within the words of the latter Statute, no costs are payable by the defendant. (1)

In ordinary cases it will be sufficient in this action for the plaintiff to prove himself in possession of the rectory or tithes, without entering into his title ; (2) as, where he has been some

(1) Bernard v. Moss, 1 H. Black. 107.

(2) Vide Bal. N. P. 125.

Part II.
Action for
tithes.

- time in the uninterrupted receipt of tithes from the different landholders in the parish, and no one has disputed his title; and if the rector of *A.* has for a length of time been in the undisturbed receipt of tithes arising from a particular close in the parish of *B.* that will also be *prima facie* evidence of his title to such tithes.(1) But the mere circumstance of his having, as farmer of the tithes, called a meeting of the parishioners to treat with them as to a composition, when no agreement took place in consequence, is not sufficient, although no one at that meeting disputed his title.(2) In cases, therefore, where no acknowledgment of his title has taken place, he must prove it. If he claim as parson, he must prove his ordination by the bishop, his institution and induction into the living, and, as said in some books,(3) his subscription to the declaration in the act of uniformity in the presence of the bishop, and his reading the thirty-nine articles within two months, and declaring his assent to them. This latter evidence, however, since the case of *Powell v. Milbank*, does not seem to be strictly necessary, until the contrary is shown by the defendant.(4) If the plaintiff sue as a lay impropriator, the strict proof of title is to shew that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims;(5) but, as deeds and instruments are liable to be lost, length of possession, and old deeds, conveying tithes, have been deemed sufficient evidence of title.(6) When the plaintiff sues as farmer of the tithes, he must prove a lease by those under whom he claims,(7)
- The plaintiff must then prove the defendant's occupation of lands within the parish, his taking away the tithes, and the value of them; and, if there has been any agreement for a composition, it has been said that he must shew such composition to have been discharged by six months regular notice, expiring at the end of the year, in the same manner as in the common case of a tenancy from year to year.(8) A mere conversation and demand of the tithes two years before the action, not followed by any formal notice, has been holden not to be sufficient;(9) but where the inhabitants of a parish had been for a length of time in the habit of paying a certain composition for the vicarial tithes, and at the usual time of settlement the vicar gave a verbal notice to the parishioners, that for the future he should require the tithes to be rendered to him in kind, this was considered as determining the composition, and entitling him to
- (1) *Barnes v. Messenger*, 3 East, 251.
- (2) *Wyburd v. Tuck*, 1 Bos. & Pul. 458.
- (3) Vide *Bul. N. P.* 188, &c.
- (4) Ante, See also *Monks v. Butler*, 1 Roll. Rep. 83, and 3 East, 199.
- (5) Vide *Comyn's Rep.* 651.
- (6) *Kynaston v. Clark*, 5 T. Rep. 265.
- (7) *Selwyn v. Baldy*; and *Hartridge v. Gibbs*, *Bul. N. P.* 188.
- (8) *Bishop v. Chichester*, 2 Bro. Ch. Rep. 161. See vide *Wyburd v. Tuck*, ubi sup.
- (9) *Fell v. Wilson*, 12 East, 82.

call on the landholders present to set them out.(1)* On this evidence the lands will be presumed to be chargeable, unless the contrary be shewn on the part of the defendant, and though they have never paid tithes, that alone will furnish no defence, if the declaration state that tithes were yielded and *payable*;(2) within forty years next before the making of the Statute; though where the declaration merely stated that they were yielded and *paid*;(3) within forty years next before the Statute, some evidence of payment was required; and, though a layman cannot prescribe *in non decimando*, yet if the tithes belong to a lay impropriator, and the land in question has been constantly ploughed, and no tithe paid, it may be ground for the jury to presume a grant by him, and severance of the land from the rectory.† In this case, therefore, the *onus* will lie on the defendant to shew that it has been constantly before in a state of tillage.(4)

Ch. XVI. s. 1
Action for
tithes.

(1) *Leech v. Bailey*, 6 Price, 504.

(2) *Mitchel v. Walker*, 5 T. Rep. 260. See also *Halwell v. Trappes*, 2 Bos. & Pul. N. R. 173.

(3) *Lord Mansfield v. Clarke*, cited 5 T. Rep. 263.

(4) *Vide Com. Rep.* 648.

Rotheram v. Fanshaw, 3 Atk. 628, 5 T. Rep. 264, &c.

(5) *Driffeld v. Orrell*, 6 Price, 325.

In cases where the lands are discharged from tithes by a money payment or *modus*, the evidence will be of the same nature as in all other cases of custom, viz. the constant and uniform payment of the sum taken in lieu of tithe. A continued payment of a sum, small enough to be considered as an *immemorial* payment, will, if the origin of it be not shewn by the parson, be deemed sufficient evidence of its having been immemorial; and the circumstance of the witnesses calling it a composition, will not lessen the legal effect of such payment.(5) It has been much the practice of late years to produce ancient documents, such as Pope Nicholas's Taxation, the Ecclesiastical Survey, and ministers accounts in the time of Henry the eighth, and the parliamentary surveys in the time of the commonwealth, to invalidate *moduses*; and in the above case the latter document

* In this case the Chief Baron RICHARDS held, that where a *modus* was set up which failed, the defendant could not insist on notice. In *Bishop v. Chichester*, vide supra, Lord THURLOW on the authority of *Adams v. Hewit*, contrary, as it should seem to his own judgment, held otherwise; and there does not, in point of sound sense, appear to be greater reason for it, than in the common case of a tenant who sets up title in himself.

† In *Meul v. Norbury*, 2 Price, 338, the Court of Exchequer, held, that a grant of tithes could not be presumed, even as against a lay impropriator, unless some evidence were given of the grant; or enjoyment of the tithes shewn by something like actual permanency, or a dealing with the tithes as owner; and that the circumstances of the church having been long dilapidated, and no tithe paid, of a former impropriator having declared that the lands in question were exempt from tithes, and leases from the rector of the impropriate rectory excepting the tithes, were not sufficient to raise the presumption. See vide *Lady Dartmouth v. Roberts*, 16 East, 334; ante.

Part II.
Action for
tithes.

(1) *Jee v. Hockley*, 4 Price, 87; vide 6 Price, 377.

(2) *Drake v. Smith*, 5 Price, 369. *Mytton v. Harris*, 3 Price, 19.

Bishop of Winchester's Case, 2 Co. 11.

Vide *Hob.* 292.

Ante, 135.

Nash v. Mollins, Cro. Eliz. 206. *Hob.* 300.

appears to have been introduced for that purpose, on which the Chief Baron RICHARDS is reported to have said, "that the fact of the parliamentary survey, not referring to the moduses, was nothing when opposed to the proof of actual payment. Had that document (his Lordship added,) though it is certainly entitled to great weight on some questions, even stated that there was no modus, it would not, as being on that subject *res inter alios acta*, be strong enough to overturn the positive evidence of actual payment, still less was the mere omission to mention it sufficient." On other occasions (1) these documents have been considered as by no means conclusive on such a question. But a terrier, signed by the minister and parishioners, is the strongest evidence which can be adduced either to disprove the modus altogether, or to prove the nature of the payment, and define its legal character. (2)

Where the defendant contends that the lands are wholly exempt from tithes, he must shew the ground of discharge; for the mere circumstance of their not having been before charged, is (as observed above) not sufficient, because a layman cannot set up a prescription *de non decimando*, without deducing his title from some ecclesiastical person, though he may one, *de modo decimandi*, without any such aid.

But though a layman cannot so prescribe, a bishop, or his tenant or copyholder, may shew that he and all his predecessors, seised of such a manor in right of the bishoprick, have held the manor by them and their tenants discharged of tithes; and the Stat. of 31 Hen. 8, c. 13, having continued the exemption of lands belonging to the monasteries thereby dissolved, in the same manner as those religious houses enjoyed them before their dissolution, any lay person, upon shewing that such lands did belong to a religious house dissolved by that Statute, or by Stat. 32 Hen. 8, c. 24, and that while in their hands they were exempt from tithes, may hold such lands discharged from them in the same manner as they were enjoyed by the monastery.

The grounds of discharge, which spiritual persons enjoyed before this Statute, were four in number, viz. 1. By the pope's bull of exemption, which may, as was observed before, be proved by the bull itself, or an exemplification of it under the bishop's seal, and proof that the lands in question belonged to those mentioned in it.

2dly. By prescription, and unless it be proved that the lands have paid tithes, the mere circumstance of their having belonged to a monastery so dissolved, will be *prima facie* evidence that

they immemorially held it discharged of tithes. The religious house must be one founded before the time of legal memory (1 *Rich.* 1.) for if founded within that time, there could be no such prescription.

Ch. XVI. s. 2.
Action for
tithes.

3dly. By composition real, which was, when lands, or other real recompense, were assigned to the parson as a compensation for the tithes of the land in question. This must be made with the parson, by consent of the patron and ordinary, and may exist in the case of a layman, as well as of an ecclesiastical person. Those made with the ecclesiastical houses, must, of course, be made before the Statute of 13 *Eliz.* c. 10, by which parsons and vicars are restrained from making any conveyances of the estate of their churches, other than for their lives, or twenty-one years, so that no composition created since that time can be supported against the successor, though confirmed by a decree of the Court of Chancery. To prove a composition with a lay person, however, the instrument itself whereby the composition was made, should be shewn, either by its production, or some evidence of its former existence, for no presumption is admitted of it by mere non-payment or reputation.(1)

(1) 2 Wood,
107. Vide
Comyns' Rep.
649; and Hob.
297. *Chat-
field v. Fryer*,
1 Price, 253.

4thly. By order, as the templars, cistericans, and hospitallers of *Jerusalem*; these, however, were exempted only during such time as the lands were in their own occupation and manurance. To entitle lands to this exemption, it is necessary that they should have been in the hands of those orders before the council of *Lateran* (1179;) and if such lands have ever paid tithes it will induce a presumption that they were purchased by them after that time.(2) Another restriction on this exemption is, that the lands are only privileged while in the hands of the person who has an estate of inheritance in them as a tenant in fee or in tail,(3) for a mere lessee for life or for years. unless holding immediately under the crown,(4) is chargeable in respect of them during his occupation.

(2) Lord v.
Tuck, Buss.
(3) Wilson v.
Redman,
Hard. 174.
(4) Owen, 46

But the Statute of *Hen.* 8, has introduced another exemption which did not exist before it, and that is, where there was a unity of possession by the religious house, of the parsonage and the land which is attempted to be charged, provided that such unity existed from time immemorial, and that no tithe was paid for it by the abbot or his farmer; for if united within time of memory, or tithe has been paid, it is not discharged by the Statute. However, in this case, as in former, if the unity be proved, and the time of the union cannot be ascertained, and there is no evidence of tithes having been paid, the presumption will be in favour of

Hob. 293.

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Action for
tithe.

(1) Saville,
62.
Vide Hob.
299.

(2) 2 Co. 47.
Fosset v.
Franklin, Sir
T. Raym.
225.
Ante, 127.

Vide Bul. N.
P. 191.
1 Ves. 117.

(3) Jones v.
Le Davids,
Exch. Hil. T.
1791. ex. rel.
Williams,
Ser.

Vide Com.
Dig. Dismes
(H. 15).

(4) Warwick
v. Collins, 2
M. & S. 349.
5 M. & S.
166, S. C.
which see.

its exemption.(1) This, therefore, is in effect the same as a discharge by prescription, and when put specially on the record may be so pleaded.

It may be proper to observe on these several modes of exemption, that they extend only to such lands as came to the crown by virtue of the Statute of 31 & 32 Hen. 8, and not to such as came to it either by 27 Hen. 8, c. 28, which dissolved the lesser abbeys, or by 1 Edw. 6, c. 14.(2)

The fact of the lands belonging to a monastery, &c. is generally proved by the survey of their lands at or soon after the time of their dissolution, or by some other public document, the evidence and effect of which have been before taken notice of. Most of the documents are to be found either in the Augmentation Office or Chapter House.

Another defence, which may be made to actions of this kind, is where barren lands are newly inclosed. These are exempted for seven years, by the before-mentioned Statute of Edw. 6, but, to support this defence, it must be proved, that the land is utterly barren and unprofitable. Land which when cleared will immediately yield a crop without any extraordinary manure, though the cultivation is attended with considerable expense, is liable to tithe;(3) and, therefore, a warren or sheep walk which is ploughed, a wood which is grubbed and then sown with corn, land recovered from the sea, or drained, cannot claim this exemption, unless they are so bad in themselves as to require an extraordinary expense of manure or labour(4) before they will produce any crop.

SECTION III.

In the action for dilapidations.

Sect. 3.
Action for
Dilapidations.

IN the action for dilapidations of the parsonage-house or buildings, brought against the predecessor of the plaintiff, or his executor, the plaintiff must, in the first place, prove his own title, by the same means as are pointed out in the case of an ejectment for the rectory, or action for not setting out tithes. He must then prove that the defendant or his testator was possessed of the living, and this possession may be proved by the circumstance of his acting as parson, by preaching, taking tithe, &c.

Lastly, the plaintiff must prove the state of the buildings at the time of the resignation of the defendant, or death of his testator, and the money which either has been, or necessarily must be expended to put them in a proper state of repair. As to the state of the repairs, at the time when the defendant came into possession, it seems not to be material, if, as has been said, he is answerable for the whole dilapidations, whether arising in his own time or before; but, as this has never been judicially decided, it may, when evidence of that fact can be adduced, be proper to be prepared with it.

Ch. XVI. s. 3.
Action for
dilapidations.

Vide 3 Bar.
Ecc. Law,
184.

SECTION IV.

In the action for non-residence.

THE first Statute which authorised the temporal Courts to take cognisance of, and enforce the residence of the clergy, was the 21 Hen. 8, c. 13, whereby it was enacted, that as well all and every person then being promoted to any archdeaconry, deanery, or dignity in any monastery, or cathedral church, or other church, conventual or collegiate, or being beneficed with any parsonage or vicarage, as all and every spiritual person and persons which thereafter should be promoted to any of the said dignities or benefices, with any parsonage or vicarage, should be resident and abiding in, at, and upon his said dignity, prebend, or benefice, or at one of them at the least; and in case he should not keep residence at one of them, as aforesaid, but absent himself wilfully by the space of one month together, or by the space of two months, to be at several times in any one year, and make his residence and abiding in any other places by such time, he should forfeit, for every such default, 10*l.* half to the King, and half to him that would sue for the same.*

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dence.

* It is provided that this Act shall not extend to certain persons excepted out of it, and, amongst others, scholars abiding for study, without fraud or covin, at any university, and chaplains to the king, queen, and other persons named in the Act, during the time of their attendance.

The Stat 25 Hen. 8, c. 16, extended the exemption to the chaplains of the Judges and of the attorney and solicitor general, residing in their houses; and the 23 Hen. 8, c. 13, narrowed the exemption of students at the university to such as were under forty years of age, and who were present at the ordinary lecture, &c. saving

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dence.

Thus stood the law on this subject till very lately, when a great number of actions having been brought by common informers against clergymen for non-residence, some of which were very vexatious and oppressive, the legislature thought proper to suspend such actions from time to time, till the law on this subject should be well considered, and some further provisions introduced; and at length a Statute was passed (43 *Geo. 3, c. 84*.) whereby (*s. 12*.) so much of the Act of 21 *Hen. 8*, as imposes the penalty of 10*l.* on persons therein described who shall not reside, &c. was repealed, and further provisions enacted. The Statute was itself repealed by another Act, also made in the late King's reign; and now by Statute 57 *Geo. 3, c. 99, s. 5*, it is enacted, that thenceforth every spiritual person, holding any benefice, who shall, without such license or exemption as in this Act allowed for that purpose, wilfully absent himself therefrom for any period exceeding the space of three months together, or to be accounted at several times in any one year;^a and make his residence and abiding at any other place or places, except at some other benefice, donative, perpetual curacy, or parochial chapelry, of which he may be possessed, shall, when such absence shall exceed such period as aforesaid, and not exceed six months, forfeit and pay one-third of the annual value (deducting therefrom all outgoings, except any stipend paid to any curate,) of the benefice, donative, perpetual curacy, or parochial chapelry, from which he shall so absent himself: and,

however, the privilege of the Chancellor, and other officers of the university, though above that age.

The exemptions were again extended by the Stat. 33 *Hen. 8, c. 28*, to one chaplain of the Chancellor of the Duchy of Lancaster, and of other officers therein mentioned, residing in their houses, and attendant on their persons. But it was provided by the latter Statute, that such chaplains should repair twice a year at the least to their benefices, and there abide eight days, at each time, to visit and instruct their cure, on pain of forty shillings, &c.

Most of these exemptions were continued, and some others added, by the Stat. of 43 *Geo. 3, s. 15*, and 57 *Geo. 3, s. 10*, and the chaplain of the House of Commons added to the number; but the privilege of non-residence at the university is confined to persons under the age of thirty years.

^a On these words, in the Stat of 43 *Geo. 3*, the Courts of King Bench and Common Pleas both held, that the Legislature intended a year from the time when the action was commenced, (*Hardy v. Cathcart, 2 Tams, 2. S. C.* in error 2 *M. & S. 534*;) but by the last Stat. (*s. 38*.) it is enacted, that, for all the purposes of the Act, the year shall be deemed to commence on the 1st January, and be reckoned therefrom to 31st December, both inclusive; and that, (*s. 39*.) for all the purposes of the Act, a month shall be deemed a calendar month, except where a month or months is or are to be made up of different periods, in which case thirty days shall be deemed a month.

when such absence shall exceed six months, and not exceed eight months, one-half of such annual value; and, when such absence shall exceed eight months, two-thirds of such annual value; and, when it shall have been for the whole year, three-fourths of such annual value; the whole penalties are given to the informer. But it is provided by sect. 18, that no parsonage that has a vicar endowed, or perpetual curate, and having no cure of souls, shall be deemed or taken to be a benefice within the intent and meaning of the Act. It is provided by sect. 6, that where there is no house belonging to the benefice, a residence within the limits of the parish shall be sufficient: and by sect. 7, that when the governors of Queen *Anne's* bounty have purchased, or shall purchase houses not situated within the parish, but so sufficiently contiguous and suitable; as to be convenient for the residence of the clergyman, such houses having been previously approved by the bishop, by writing under his hand and seal, and duly registered, &c. shall be deemed houses of residence.

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dence.

Sect. 8, provides, that on rectories, having vicarages endowed, the residence of the vicar in the rectory house shall be deemed a legal residence, provided that the vicarage house be kept in proper repair to the satisfaction of the bishop.

And by sect. 9, that the bishop may, in every case where there shall not be a house of residence belonging to the benefice, allow and adjudge any fit house within the limits of the benefices, and belonging thereto, or any fit house belonging thereto, not within the limits, but so contiguous as to be sufficiently convenient for the purpose, to be the house of residence thereof; and such allowance and adjudication in writing, &c. shall be registered from time to time, and be deemed the house of residence for the time being.

By sect. 11, it is provided, that it shall be lawful for any person, being dean, during such time as he shall reside on his deanery, or being prebendary or canon, or holding any other dignity in any cathedral or collegiate church, who shall reside any period not exceeding four months altogether within the year upon such dignity, to account such residence as if he had legally resided on some benefice; and that it shall be lawful for any spiritual person, having or holding any prebend, canonry, or dignity, in any cathedral or collegiate church, in which the year, for the purposes of residence, is accounted to commence at any other period than the 1st of *January*, and who may keep the periods of residence required for two successive years at such

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dence.

cathedral or collegiate church, in whole or in part, between the 1st of *January* and the 31st *December*, in any one year, to account such residence; although exceeding four months in the year, as reckoned from the 1st of *January* to the 31st *December*, as if he had legally resided on some benefice. And the bishop is further empowered (sect. 12,) to license any longer period of non-residence upon any such benefice of any prebendary, canon, or other person, holding any dignity in any cathedral or collegiate church, in any case in which it shall appear to him, from his own knowledge (if such cathedral or collegiate church is locally situate within his own diocese, or if not, by the certificate of the bishop of the diocese in which the cathedral or collegiate church shall be locally situate,) to be required for the performance of any duties in any such cathedral or collegiate church; provided that every such spiritual person shall, during such period, reside on such prebend, &c.; and a general proviso is added, (sect. 13,) in favour of any prebendary, &c. appointed before the making the Act, while actually resident.

By the 14th sect. a person having a house of residence upon his benefice, and who shall not reside thereon, is required during such period or periods of non-residence, whether the same shall be for the whole or part of any year, to keep such house of residence in good and sufficient repair; and not doing so, and upon monition issued by the bishop, not putting the same in repair according to the requisition of the monition, within the time specified therein, to the satisfaction of the bishop, and to be certified to him upon such survey and report as shall be required by him, is made liable to all penalties for non-residence, notwithstanding any exemption or license during the period of such house of residence remaining out of repair, and until the same shall have been put into good and sufficient repair, to the satisfaction of the bishop.

The several sections, from the 15th to the 23d, contain various regulations as to licenses for non-residence to be granted by bishops, in certain cases, and by them with the sanction and allowance of the archbishops in others; and by the 23d section, every person who shall be non-resident by reason of any residence on another benefice, or of any exemption, to entitle him to obtain which it is not necessary to have a license, shall, within six weeks after the 1st *January* in every year, notify the same in writing under his hand to the bishop of his diocese.

The Statute (sect. 35,) further enacts, that no penalty shall be recovered other than such as may have been incurred during

the year ending on the 31st day of *December*, immediately pre-
ceding the commencement of the action. That (sect. 37,) no
action shall be commenced till the first of *May*, after the expi-
ration of that year; and that (sect. 40,) a month's previous no-
tice shall be given to the party, or left at his dwelling-house,
containing the cause of action, &c. and name of attorney en-
forced. That (sect. 41,) the delivery of such notice shall be
proved on the trial; and (sect. 42,) that no evidence shall be
received of any cause of action, except such as is contained in
the notice.

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dence.

The 43d sect. permits the defendant to pay into Court such
sum of money as he shall think fit, subject to such rules as in
other actions wherein the defendant is allowed to pay money
into Court; the 46th sect. enables the defendant to plead a mo-
nition by the bishop against him for non-residence, in case such
monition has been issued against him before the service of the
notice. The 47th sect. enacts, that no penalty shall be levied
against the body of the defendant, where it can be recovered by
sequestration within three years.

It is unnecessary to say more as to the proof of notice, than
to refer to what has already been written on that subject, when
speaking of actions against justices of the peace. After that
preliminary proof, he may proceed with the rest of his case.

We have before seen, that if an action were brought on the
Stat. of 21 *Hen.* 8, the plaintiff was not put to farther proof of
the defendant being beneficed with the living, from which he
had absented himself than acts done by himself as the clergy-
man of that place, such as receiving tithes, &c. and the same
evidence will still, I conceive, be sufficient. The plaintiff must
then prove the absence of the defendant during the time charged.
If there were a parsonage-house, his residence in any other
house within the parish, would, under the former acts, subject
him to the penalties of the act, and will still do so, unless he has
the bishop's license for that purpose, according to the directions
of the Statute; or is within the other provisions contained in
it. Lastly, he must prove the value of the living, and as this
would frequently be a task of considerable difficulty, the Statute
(sect. 44,) has provided that the Court in which the action is
depending, shall, upon application made for that purpose, re-
quire the bishop of the diocese to certify in writing under his
hand to the Court, and also to the party named in the rule, the
reputed annual value of the living, which certificate shall, in all
subsequent proceedings in the action, be received as evidence

Bevan v.
Williams,
ante,

Canning v.
Newman,
2 Brownl. 54.

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dence.

of the annual value, for the purposes of the act, without prejudice, nevertheless, to the admissibility or effect of any such other evidence as may be offered or given respecting the actual value thereof.

2 Brownl. 55.

The defendant was formerly permitted to shew ill health, or other sufficient reason to excuse his absence. But these excuses are all now settled by the positive terms of the act. He cannot, when not exempted, be permitted to shew any other cause, without license of the bishop; and, if he has obtained such license, which can only be granted upon evidence laid before the bishop, the license itself will be sufficient evidence for the defendant in the action, and, if pleaded, will, by the 45th section, entitle him to double costs, in case a verdict be found for him. In cases where the defendant is exempted without the aid of a license, he must prove his exemption, by proving his appointment as chaplain, &c. and that he has duly resided according to the several acts; and must also prove the delivery of his notification thereof to the bishop. To shew this fact, he should prove the actual delivery of it to the bishop, by having the original brought from the registry; for the provisions contained in the Stat. of 48 Geo. 3, s. 25, whereby the defendant, having delivered a duplicate to the registrar of the diocese, and got a copy certified by such registrar, might use such copy as sufficient evidence of his having made such notification, does not appear to have found a place in the last Act of Parliament.

CHAP. XVII.

OF THE EVIDENCE IN COPYHOLD CASES.

To maintain an ejectment for a copyhold tenement, the lessor of the plaintiff must produce the rolls of the manor, which shew a surrender to him, or those under whom he claims ; and, in general, his own admittance is necessary to complete his title.(1) An heir-at-law, however, may make a lease, and maintain the action before admittance ; and where a tenant for life has been admitted, upon the surrender granting that estate, his admittance operates as the admittance of the remainder-man, named in the same instrument also, for it is but one estate.(2) So if *A.* and *B.* be in possession by virtue of a grant for their lives, and the lord grants to *C.* for life, from and after the deaths of *A.* and *B.*, *C.* may maintain an ejectment immediately on the death of the survivor, without further admittance.(3) But a devisee cannot maintain any action before admittance ;(4) and if such devisee never be admitted, a devise by him is void, and the legal estate descends to the heir at law of the original testator.(5) So before the Stat. 55 Geo. 3, c. 192, (which takes away the necessity of surrenders to the use of wills,) if the surrenderer made a surrender out of Court to the use of his will, before he had been himself admitted, such surrender was void, and could not be made good by a subsequent admittance,(6) and devisees of a mere contingent remainder, not being in the seisin, cannot make any surrender of their interest.(7) In a case, where a mortgagee brought an ejectment and showed a surrender to him before the day of the demise laid in the declaration, and proved his admittance in consequence,(8) the Court held that he was entitled to recover, though, in fact, the admittance was not made till long afterwards ; for, when once made, it related back to the time of the surrender. In this case the Court said, that even if these had been no admittance, yet, as against the mortgagor, the ejectment would be maintainable ; assigning as a reason, that the mortgagor, being only a trustee for the mortgagee, should not be permitted to set up his legal interest against the claim of his *cestui que trust* ; but we have before had occasion to observe,(9) that a different doctrine has since been established from that which then prevailed respecting the action of ejectment.

It has been before observed, that the Statute of Frauds does not extend to wills of copyhold lands. It is sufficient in this

Ch. XVII.
Ejectment
for copyhold.

(1) Rumney
v. Eves, 1
Leon. 100.
Doe dem.
Tarrant v.
Heller, 3 T.
Rep. 162.

(2) Auncelme
v. Auncelme,
Cro. Jac. 31.

(3) Roe dem.
Cosh v. Love-
less, 2 B. &
A. 453.

(4) Roe dem.
Jefferys v.
Hicks, 2 Wils.
15.

(5) Doe dem.
Vernon v.
Vernon,
7 East, 8.

(6) Doe dem.
Tosfield v.
Tosfield,
11 East, 185.

(7) Doe dem.
v. Palmer,
11 East, 185.

(8) Holdfast
dem. Wool-
lam v. Clap-
ham, 1 T.
Rep. 600.

(9) Ante, 521.

Part II.
Copyhold
cases.

Vide Carey v.
Askev, 2 Bro.
C. Cas. 59.
2 Coxe's
P. Will. 259.
note, S. C.
Doe dem.
Cooke v.
Danvers,
7 East, 299.

case that there is a will in writing, though it is neither signed by the testator, nor attested by any witness ; but what shall be deemed sufficient proof of such will does not appear to be very clearly ascertained. It has been said that any written paper, which the Ecclesiastical Court would hold to be a will, shall be considered as a sufficient declaration of the use to which the estate was subjected by a surrender to the use of a will ; and, therefore, it has been usual not only to prove the original paper writing, but also to produce the probate which has been granted of it ; and even instructions taken by an attorney for the making of a will, when so proved, have been holden sufficient to pass the estate.

Doe dem.
Smith v.
Smith, Thet-
ford Spr.
Assizes, 1805.
cor. Mans-
field, C. J.

In one case a paper found in the bureau of the testator was produced. This paper was all in the testator's hand-writing, and contained a blank attestation ; but it was not signed by the testator, nor had any witness put his name thereto. It was contended that the instrument appearing on the face of it to be an incomplete thing, the Ecclesiastical Court would never grant probate of it ; and, therefore, it was not a will ; but that even if it were otherwise, as no probate had been granted, it could not be received in evidence, as a will, within the meaning of the surrender. The learned Judge who tried the cause rejected the evidence altogether, and as there had been no probate, would not suffer any witness to be examined in support of the paper, but the Court of King's Bench afterwards granted a new trial ; and the devisee making no defence thereon, the point was not further discussed. From this decision of the Court of King's Bench, however, it seems to have been the opinion of that Court, that the Courts of Common Law may enter into the question, whether the paper amounts to a will, though no probate has been in fact granted ; and, indeed, where the will is merely of the copy-hold land and no personality is bequeathed, the whole must depend on the paper itself, for the Ecclesiastical Courts never could take cognisance of it. To this we may add, that in the cases before the Statute of Frauds, wherein it came to be a question what should be a will of lands under the Statute of Wills, 32 Hen. 8, c. 31, (and which cases seem to be most applicable to the present point) (2) no argument was drawn from the grant of probate by the Ecclesiastical Court, but the Common law Courts themselves decided what was a will, without the aid of their construction. In those cases, as in the present, any disposition of the estate by writing, whether such writing were made by the testator himself, or by any other person by his commandment or consent, was holden to be a will within the meaning of the Statute.

Vide Saekvill
v. Brown,
Dyer, 72.
Nash v.
Edmunds,
Cro. Eliz. 100.
(2) Vide 7
East, 324.

But where the testator merely told the witness, that a third person should have his land, and the witness recited the words of the intended will to the testator, and asked him if this should be his will, to which he assented; and the witness afterwards put it into writing, but never shewed the writing to the testator, or read it to him, this was determined not to be a good will, as not being made in *writing* by the testator.

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cases.

Nash v.
Edmunds,
Cro. Eliz.
100.

When the Lord himself claims the estate, as forfeited by reason of a lease made by the defendant, he must prove, that the person who is alleged to have committed the forfeiture was admitted tenant on the Rolls of the manor. It will not be sufficient, in this case, to prove that his father was admitted, and that the land descended to him, and that he has paid quit rents; for, though he might enter to make a lease before admittance, nothing vested in him which he could forfeit before admittance and entry.

Read v. Allen, per Comyns, Oxf. Circ. 1730. Bol. N. P. 107.
Vide etiam Wilson, 15.

Another case, in which very strict evidence has been required, is, when the Lord seizes the land as forfeited for want of the heir coming in to be admitted. In this case it has been said, that the proclamation should be proved by *viva voce* evidence, and that the entry thereof on the Court Rolls is not sufficient. (1) It should be observed, however, that this point is not mentioned in another report of the same case; (2) and in a late case, (3) where such a claim was set up, no such evidence appears to have been required. It was determined in that case that the Lord could not seize *absolutely pro defectu tenentis* without a special custom authorising him so to do; and, therefore, to support a seizure so made, it will be necessary to prove such a custom.

(1) Lord Salisbury's Case, 4 Keb. 287.
(2) 1 Lev. 63
(3) Doe dem. Tarrant v. Heulier, 3 T. Rep. 162.

To prove the custom of a manor, the first evidence to be referred to will be the Court Rolls, and on the antiquity and uniformity of these will, in a great measure, depend the validity of the custom. If a payment be claimed by the Lord, as an ancient and accustomed payment, the books of the steward or bailiff of the manor, whereby he charges himself with monies received, may also be produced; (4) but, unless it appear that such a sum of money has been from time to time paid by the tenants, the mere entry by the stewards is very weak evidence. So where the question was, whether the lord was entitled to the coals under a freehold tenement within the manor, parol evidence was received of a known distinction within the manor, between old

Vide ante, 133.

(4) 12 Vin. 105, pl. 5.

* Mr. J. BULLER also cites 1 *Lord Raym.* 726, in the margin; but, as this book does not contain any thing as to this point, I presume it was established in *Read v. Allen*.

Part II.
Copyhold
cases.

(1) *Burnes v. Mason*,
1 M. & S. 77.

(2) Vide
4 Leon. 248,
and Mr. J.
Grose's Ob-
servations on
that Case, 4
T. Rep. 32.

(3) *Aste*,

(4) *Doe dem.
Foster v.
Simon*,
13 East, 62.
*Roe dem.
Bennett v.
Jeffery*, 2
M. & S. 92.

(5) *Roe dem.
Bennett v.
Jeffery*, 2
M. & S. 260.

*Lord North-
wick v. Stan-
way*, 6 East,
56.

and new land, and the general reputation that the right of coals under the latter belonged to the Lord.(1) And, indeed, in all cases of custom, as many instances as possible of its having been acted upon should be produced,(2) though we have before observed, that where a custom is formally found by the homage, and entered on the rolls, proof of its having been acted upon, is not absolutely necessary.(3) Thus where it is contended, that by the custom of a manor land shall descend to the eldest female heir, general reputation of such custom, and instances of its having so descended, in some instances, are evidence proper to be left to a jury, though the descent contended for in the particular instance, is not exactly similar to any of those that are adduced in evidence, as where the estate is claimed by the grand son of an eldest sister, and the instances proved are only of descents to eldest daughters and eldest sisters.*(4) And in like manner it has been held, that a single instance of a surrender in fee, by a tenant in special tail, of a copyhold estate, is evidence to prove a custom to bar entails by surrender, though the surrenderor has not been dead twenty years, and though one instance be proved of a recovery suffered by tenant in tail to bar the entail.(5)

When the Lord brings an action for a fine not exceeding two years value of the premises, on the defendant's admission to them, the defendant's admission, the presentment of the homage as to the value, and proof of the sum required by the action having been demanded of the defendant by letter from the steward, is sufficient, without further proof of the fine having been assessed.

* The case of *Doe dem. Goodwin v. Spray*, 1 Term. Rep. 466, in some measure militates against this, but there the Court seem rather to have considered the question as being whether a custom *that lands should descend to the eldest sister* was proof that they should go to the *eldest niece*; than whether a custom *that they should go to the eldest female heir*, with no instance to support it but the case of sisters, could be received as evidence of a more extensive custom that it should in all cases go the eldest female heir; and it should seem that where the rolls of the manor declared that "*nulla tenementa sunt partibilia nec inter heredes masculos nec femellas*," there was evidence of such a general custom. It is observable also, that the judgment in that case was founded on what was said by CoKE C. J. in *Ratcliffe v. Chapman's Case*, 4 Leon. 242, that the Court would not give credit to the custom unless it had been put in use; wherefore it was concluded, that as no instance of the particular case was proved, the custom, if any, had no weight; without considering that, in the case of *Ratcliffe v. Chapman*, there was evidence of descents contrary to the supposed custom, a kind of proof which did not exist in the case then before the Court; and in the subsequent case, (*Roe dem. Bebes v. Parker*, 5 T. Rep. 26,) when Lord KENYON presided in the Court, a custom entered on the rolls was held to be sufficient though no instance of usage was adduced.

APPENDIX.

No. I.

CASES ON THE QUESTION, HOW FAR REPUTATION IS ADMISSIBLE
IN QUESTIONS OF PRIVATE RIGHT?

Doe, Lessee of Didsbury & another v. Thomas & others, 14 East,
323. (Page 28.)

IN this case, where a testator between fifty and sixty years ago devised lands to his son for life, remainder to his grand son for life, remainder to the heirs of the body of the grand son, remainder to the lessor of the plaintiff in tail; between which latter and the defendant, the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son in the life-time of the testator, was part of the entailed estate, or had been acquired by his own purchase: the Court held, that evidence of *reputation that the land had belonged to Sir J. S. and was purchased of him by the first testator*, is not admissible; though coupled with corroborative parol evidence that the land belonged to Sir J. S. before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, *amongst other lands*, by the testator of Sir J. S.

Mr. East subjoins the following note to the report of that case:—

The admissibility of evidence of this description has been *vexata questio* for many years in *Westminster Hall*; as the following notes, which I have taken from time to time, will suffice to shew.

The following is the same case which is reported in 4 *Term Rep.* 157, for another point which came on upon demurrer, in *Hil. 31 Geo. 3.*, and where the plaintiff had leave to amend.

Moorewood v. Wood, M. 33 Geo. 3, B. R.—Trespass for breaking and entering the plaintiff's close called *Swanwick Common*, in the parish of *Alfreton*, in the county of *Derby*, and digging stones therein, and carrying them away, &c. The defendant pleaded, that there are certain wastes or commons lying open to one another, one called *Swanwick Common*, being in the close in which, &c. the other called *Swanwick Green*, in *Alfreton*, &c.; and that he was seized in fee of a messuage and lands in *Alfreton*, in right of which he prescribed for the liberty of digging for and carrying away all necessary flags and stones in *Swanwick Common*, and in *Swanwick Green*, for the repair of his houses, fences, &c. The plaintiff replied, that he was lord of the manor of *Alfreton*, and that the defendant of his own wrong committed the trespass. The defendant, in his rejoinder, insisted on his prescriptive right as stated in the plea; on which issue was joined. At the trial before HORTON B. at *Derby* assizes, the defendant called many witnesses, who proved that, for between sixty and seventy years past, he and those from whom he claimed had been in the constant exercise of the right stated in his plea; in many instances to the knowledge of the lord, who had threatened to bring actions, and been dared to do so by the defendant's ancestors, who insisted on their right. On the other hand, the plaintiff produced a presentment in 1717, of the freeholders of the court baron of the manor of *Alfreton*, of which the plaintiff is lord, and which presentment was signed by one *Robert Wood*, the foreman, and others; which name of *Robert Wood* was proved to tally with the subscription (a) to the will of *Robert Wood*, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was,—“If any person gets stone without leave of the lord of the manor, we pain him 10s.” The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the Judge's report, on a motion for a new trial. But the plaintiff's counsel stated further, (which was admitted by the other side, and so taken by the Court,) that the learned Judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz.

1st. Other presentments of a similar nature to the one received in evidence, but to which no subscription could be proved by any person from whom the defendant claimed: this was offered as evidence of reputation.

2d. General *parol* evidence of reputation, that none but the lord had a right to dig stone, &c. on the *locus in quo*.

A rule nisi having been granted, *Chambre, Clarke, Sutton, Willis*, and *Ascough* contended, in support of their rule, that a general custom or prescription, covering all the estates of the tenants of the manor might clearly be proved by evidence of reputation; and that there was no solid distinction between that case and the case of a particular prescription. There were no title deeds in the one case more than in the other, to which, as to a more certain criterion, reference could be had. In both instances the right rested on memory of particular instances of the exercise of it. In the case of a modus, reputation is evidence; and yet that relates to a particular estate. In the *Bishop of Meath v. Lord Belsfeld*, in 1747, cited in *Bul. N. P.* 395, it was held that evidence of reputation was admissible in a *quare impedit*, that one *Knight* had been in by the presentation of Lord R.; which is a stronger case than this. The case of *Webb v. Petts, Noy*, 44, was clearly the case of a modus for a particular farm; and there the Court held hearsay evidence to be sufficient. Such evidence as this is also admissible in the case of a manorial custom; and yet the public have as little to do with the custom of a particular manor as with

* Vide *Roe v. Rawlings*, 7 East, 282.

a private prescription. Other persons in the parish may claim the same right as the defendant, and then it might have been laid as a custom, in which case these presentments would have been decisive evidence against it. So that by laying it as a prescriptive right to each farm, instead of a custom, all the lord's proof of his right is gotten rid of; and the tenants may give in evidence those very tortious acts as evidence of a prescription, all which united together could not have supported a custom against the positive written testimony subscribed by all their ancestors who were tenants. Here, they said, there was sufficient to ground the hearsay evidence on.

The counsel on the other side were not heard by the Court, who made several observations during the argument, to which the counsel for the plaintiff adapted their answers. On granting the rule *nisi*,

LORD KENTON, C. J. said, he doubted very much if evidence of reputation could be adduced in support of any prescription, unless it affected the public interest in some way or other.

ASHHURST, J. in the course of the argument, said, that if this had been laid as a custom, he conceived that general reputation would have been evidence: but, in the case of a private prescription, he doubted it very much.

BULLER, J. observed, that the practice had been different on different circuits. On the *Oxford* it has been the practice to reject, and on the western circuit to receive this sort of evidence. But upon the latter, I have told the counsel, that I would indeed receive such evidence, if they pressed it, but that, in summing up, I should tell the jury that they were to decide upon the other parts of the case.

LORD KENTON, C. J. (after the argument.) The evidence given by the defendant of an usage of about seventy years is extremely strong in his favour: and the only evidence to weigh against it is that of the presentment signed by *Robert Wood*: but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised, respecting the rejection of general evidence of reputation, it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the *Oxford* circuit, which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions. How is it possible for strangers to know any thing of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion, laying in my claim to change that opinion if I should hear any thing which shakes it.

ASHHURST, J. declared himself of the same opinion: adding, that the utmost which the evidence offered went to prove in the present case was that the lord had the general right; but that did not negative a particular right, provided it was made out in evidence, which it had been in the present instance.

BULLER, J. I have already mentioned what has been the general practice on the *Oxford* and on the western circuit; and as there are two Judges from each of those circuits in Court,* it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother ASHHURST, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight

* Lord KENTON and ASHHURST, J. had gone the *Oxford*, and BULLER and GROSE, J. the western circuit.

Part. II.
Actions for
non-resi-
dence.

cathedral or collegiate church, in whole or in part, between the 1st of *January* and the 31st *December*, in any one year, to account such residence; although exceeding four months in the year, as reckoned from the 1st of *January* to the 31st *December*, as if he had legally resided on some benefice. And the bishop is further empowered (sect. 12,) to license any longer period of non-residence upon any such benefice of any prebendary, canon, or other person, holding any dignity in any cathedral or collegiate church, in any case in which it shall appear to him, from his own knowledge (if such cathedral or collegiate church is locally situate within his own diocese, or if not, by the certificate of the bishop of the diocese in which the cathedral or collegiate church shall be locally situate,) to be required for the performance of any duties in any such cathedral or collegiate church; provided that every such spiritual person shall, during such period, reside on such prebend, &c.; and a general proviso is added, (sect. 13,) in favour of any prebendary, &c. appointed before the making the Act, while actually resident.

By the 14th sect. a person having a house of residence upon his benefice, and who shall not reside thereon, is required during such period or periods of non-residence, whether the same shall be for the whole or part of any year, to keep such house of residence in good and sufficient repair; and not doing so, and upon monition issued by the bishop, not putting the same in repair according to the requisition of the monition, within the time specified therein, to the satisfaction of the bishop, and to be certified to him upon such survey and report as shall be required by him, is made liable to all penalties for non-residence, notwithstanding any exemption or license during the period of such house of residence remaining out of repair, and until the same shall have been put into good and sufficient repair, to the satisfaction of the bishop.

The several sections, from the 15th to the 23d, contain various regulations as to licenses for non-residence to be granted by bishops, in certain cases, and by them with the sanction and allowance of the archbishops in others; and by the 23d section, every person who shall be non-resident by reason of any residence on another benefice, or of any exemption, to entitle him to obtain which it is not necessary to have a license, shall, within six weeks after the 1st *January* in every year, notify the same in writing under his hand to the bishop of his diocese.

The Statute (sect. 35,) further enacts, that no penalty shall be recovered other than such as may have been incurred during

the year ending on the 31st day of *December*, immediately pre-
ceding the commencement of the action. That (sect. 37,) no
action shall be commenced till the first of *May*, after the expi-
ration of that year; and that (sect. 40,) a month's previous no-
tice shall be given to the party, or left at his dwelling-house,
containing the cause of action, &c. and name of attorney en-
dorsed. That (sect. 41,) the delivery of such notice shall be
proved on the trial; and (sect. 42,) that no evidence shall be
received of any cause of action, except such as is contained in
the notice.

Ch. XVI. s. 4.
Actions for
non-resi-
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The 43d sect. permits the defendant to pay into Court such
sum of money as he shall think fit, subject to such rules as in
other actions wherein the defendant is allowed to pay money
into Court; the 46th sect. enables the defendant to plead a mo-
nition by the bishop against him for non-residence, in case such
monition has been issued against him before the service of the
notice. The 47th sect. enacts, that no penalty shall be levied
against the body of the defendant, where it can be recovered by
sequestration within three years.

It is unnecessary to say more as to the proof of notice, than
to refer to what has already been written on that subject, when
speaking of actions against justices of the peace. After that
preliminary proof, he may proceed with the rest of his case.

We have before seen, that if an action were brought on the
Stat. of 21 *Hen.* 8, the plaintiff was not put to farther proof of
the defendant being beneficed with the living, from which he
had absented himself than acts done by himself as the clergy-
man of that place, such as receiving tithes, &c. and the same
evidence will still, I conceive, be sufficient. The plaintiff must
then prove the absence of the defendant during the time charged.
If there were a parsonage-house, his residence in any other
house within the parish, would, under the former acts, subject
him to the penalties of the act, and will still do so, unless he has
the bishop's license for that purpose, according to the directions
of the Statute; or is within the other provisions contained in
it. Lastly, he must prove the value of the living, and as this
would frequently be a task of considerable difficulty, the Statute
(sect. 44,) has provided that the Court in which the action is
depending, shall, upon application made for that purpose, re-
quire the bishop of the diocese to certify in writing under his
hand to the Court, and also to the party named in the rule, the
reputed annual value of the living, which certificate shall, in all
subsequent proceedings in the action, be received as evidence

Bevan v.
Williams,
ante,

Canning v.
Newman,
2 *Brownl.* 54.

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Bevan v. Williams,
ante,

Canning v. Newman,
2 *Brownl.* 54.

discredit to his defence, as to the acquittal of such a person by disgracing the prosecution : and this consideration enables me to contemplate the question proposed with more calmness than I should be able to view a question of which the determination might possibly, by the exclusion of his evidence, lead to the condemnation of an innocent person ; but could in no case produce the same consequence by the exclusion of evidence against him.

“ The question proposed by your lordships regards the act of ‘ a person employed by the party preferring an indictment as an agent to procure and examine evidence and witnesses in support of the indictment ;’ and it regards the act of that agent addressed to a person not examined as a witness in support of the indictment ; and leaving, therefore, those witnesses unaffected by the proposed proof otherwise than by way of inference and conclusion, and this question may be considered as it regards the prosecutor or party preferring the indictment, and as it regards the witnesses.

“ The prosecutor has, by the hypothesis, employed a person as an agent to procure and examine evidence and witnesses. This is a lawful employment, necessary in many cases, in some meritorious, in none disgraceful or improper, if we look either to the employer, or to the person employed ; and being a lawful employment, it is to be presumed, until the contrary be shewn, that the employer means and intends that his agent should execute it by lawful means ; and as, according to the general rules and principles of law, a person is not to be affected in interest or fame by any act of another, although that other may have been in his employment or confidence as an agent or otherwise, excepting such acts only as either are in their own nature, or may by extrinsic evidence be shewn to be within the scope of the authority given by him, and which may, therefore, be considered as his acts, performed by the hand, or as his declarations, uttered by the tongue of his appointed substitute,) it would be contrary to those general rules and principles to allow a prosecutor, and, through him, the prosecution that he has instituted, to be disgraced by the act supposed in your lordships question, without some further proof affecting him than the terms of that question suggest. It is perfectly consistent with the matters of fact contained in your lordships question, that the prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent ; it is no less consistent, that, having been informed of the act, he may have rejected it with indignation, and have repudiated the proffered testimony,

and withholden the witness from the Court ; and, if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case, or the propriety of his conduct in the other.

“ With regard to the witnesses, my lords, which is the most important part of this consideration, (because if false witnesses are produced against a person, it is of little consequence to him by what procurement they may have been produced,) it is to be considered, whether a legitimate inference and conclusion can be drawn against their credit and veracity from the proof proposed. The proposed proof does not directly affect them ; it regards an act, to which, according to the hypothesis, they may be entire strangers ; and, being an unlawful act, they are not to be presumed to have been parties to it, or to any other act of the like nature, without proof against them ; they may be persons of honour and probity deposing to facts really and truly occurring within their own personal knowledge, and taking place within their own sight and hearing, as they have averred upon their oath. It may have been intended that the person, to whom the bribe was offered, should speak to other facts occurring at another time and in another place wholly unconnected with them, or with the matters to which they have deposed : can it then be reasonably concluded, that the facts deposed by them are untrue ? That, however numerous or respectable they may be, they must be all wicked and perjured men, because some other man has, from overweening zeal or a corrupt heart, wickedly endeavoured to seduce by money another person to give evidence touching the matter of that indictment on which they have appeared ? I must say, my lords, that I am of opinion, that such a conclusion cannot reasonably be drawn, either in the case proposed in your lordships question, or in the analogous case which I have taken the liberty to adduce. The utmost effect, in my opinion, of the proposed proof, (and, in many cases, even this would not be a fair or reasonable effect,) would be to excite suspicion ; but suspicion is not a legitimate ground for the verdict of a jury, which ought only to be founded upon reasonable and probable proof ; for these reasons, I think your lordships’ first question must be answered in the negative.

“ This, my lords, is the opinion, which, after much consideration, I have formed upon the question proposed by the house. The question is couched in the most general and abstract terms, and your lordships must be aware of the difficulty that may often occur in forming an opinion upon a question of such a na-

ture, applied not to a matter of abstract science, but with a matter connected with the business and affairs of men. Few cases occur in the practical administration of justice, wherein a Judge does not find some help towards a right decision in a questionable point, in antecedent or accompanying facts and circumstances appearing before him, and is not guided in his application of general principles to the individual case by the particulars of that case itself. The question, as proposed by your lordships, does not contain any such aid or guide; I mention not this, my lords, by way of complaint against the question, but by way of excuse for the imperfection of my answer to it; and I must beg leave to add, that notwithstanding the opinion I have delivered on the question proposed, I am by no means prepared to say, that in no case and under no circumstances appearing at a trial, it may not be fit and proper for a Judge to allow proof of this nature to be submitted to the consideration of a jury, and the inclination of every Judge is to admit, rather than to exclude, the offered proof.

"Secondly, The same reasons which have induced me to answer your lordships' first question in the negative, lead me to answer the second question also in the negative. The question is in these words:—[*The Lord Chief Justice here read the second question.*]

"In answer to this question, my lords, I must also take leave to add, as another ground of objection to the proof proposed in the question, that it does not thereby appear what was the nature of the papers alluded to, or what the motive of the party endeavouring to obtain them: for any thing that can be inferred from that question, the papers might be unconnected with the subject of the prosecution, and relate wholly to some other and different matter."

Then ABBOTT, C. J. delivered the unanimous opinion of the learned Judges to the first part of the third question in the affirmative, also with a qualification; and gave their reasons as follow:—

"My lords, we understand the first part of this third question to relate to a prosecution for some crime, the proof whereof is to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted and under trial; so that the conspiracy is to be given in evidence against him; and the latter part of the question regards the case of a person indicted for some crime, and seeking to defend himself against that indictment by proving a conspiracy to suborn witnesses against

him ; and the points of inquiry, in both parts, regard only the order and course of adducing the proof before the Court ; and so understanding the question, we have no hesitation as to answering the first part of it in the affirmative. We are of opinion, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shewn that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to shew the true meaning and character of the acts of the individual defendants, and on that account, we presume, is permitted. But, it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the Judge is able to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy ; and if, upon such opening, it should appear manifest that no particular proof sufficient to affect the defendant is intended to be adduced, it would become the duty of the Judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exerting an unreasonable prejudice, would certainly be a useless waste of time.

“ As to the second part of the question, my lords, we understand it to be here assumed, that the supposed conspiracy to suborn witnesses against the accused is a legitimate ground of defence, and that your lordships do not ask the opinion of the Judges on that point ; and, therefore, upon that point we do not presume to offer any thing to your lordships ; and, considering this latter part of the proposed question, like the first part, to regard only the order and course of adducing the proof, we shall give the same answer in the affirmative, with this qualification only, namely, that the proposed evidence should, in some way, be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy, in order to enable the Judge to form an opinion as to the probability of bringing the evidence home, so as to affect some person whose acts are material and relevant to the issue in the indictment then under trial.”

No. III.

OBSERVATIONS, CONTAINED IN THE FORMER EDITIONS, ON THE
QUESTION—WHETHER WITNESSES CAN BE DISGRACED BY THEIR
OWN EXAMINATIONS ?

3 Blas. Com.
359.

THOSE who contend for such a mode of examination, assert that if it is not to prevail to the fullest extent, the whole benefit of *viva voce* evidence, and trial by jury, will be lost and at an end : That the office of a jury is not to find facts merely because they are sworn to by witnesses, but to weigh and estimate the credit which is due to persons standing in that situation : That, to enable them to do this, it is necessary for them to know something about the life and character of the person testifying ; and that such was the ancient policy of the law, appears from the circumstance of the jury being always summoned *de vicineto*, from the neighbourhood of the place where the cause of action arose : "Living in the neighbourhood, they were properly the very country or *pais* to which both parties had appealed, and were supposed to know beforehand the character of the parties and their witnesses, and therefore the better knew what credit to give to the facts alleged in evidence."^{*} Whereas now, the jury being summoned from the county at large, the witnesses are, in general, entirely unknown to them, and the party against whom they appear, having no notice of the witnesses who are to be called against him, has no other mode of enabling the jury to determine what credit is due to them, than by an inquiry of themselves, who they are, and how they have passed their lives. That no injury either to the witness or the cause of justice can result from this inquiry, for no honest man will refuse to give an account of himself ; and if insinuations, which are unfounded, are thrown out, he has the opportunity of denying the truth of them ; which denial, if made in the unequivocal and decided manner which conscious innocence will always dictate, will, instead of prejudicing the character of the

^{*} See also *Fortescue de Laud*, c. 26, where the same reason is given for the jury coming *de vicineto* ; and *Co. Lit.* 158, b.

witness, throw all the odium, intended to be cast on him by the charge, or the person who had the wickedness to suggest it. Whereas, if it be true, that the witness is of a cast and character which does not entitle him to full credit, he ought not to pass as a man of unblemished reputation.

On the other hand it is said, that a person who comes into a Court of justice, to testify in a particular cause, is not supposed to be prepared to answer for all the transactions of his life; that one slight deviation from the path of virtue ought not so to blast the character of a man, as to be for ever the subject of reproach to him; and that when he comes into Court, not as a volunteer, but under the compulsory process of the law, he ought not to be placed in such a situation as to be obliged either to confess, and revive the memory of a disgrace which had long since been forgotten, and which his subsequent good conduct had wiped away; or else to be tempted to commit perjury for the protection of that character which his amended course of life had procured him. That if he is wholly incompetent, by reason of the commission of a crime of which he has been legally convicted, the record of his conviction, which contains the particulars of his infamy, is the only evidence to repel his testimony. That if he is not worthy of credit, on account of his general bad character, the law has, in that case also, pointed out the means of counteracting the effect of his evidence by the testimony of others as to that character. That even in this case particular circumstances are not to be inquired into, much less ought he himself to be questioned as to those facts which others cannot be permitted to prove. That though in some instances the party may be surprised by finding a witness in the box, of whom he has no previous knowledge, yet this so rarely happens, that it is infinitely less mischievous to submit to the inconvenience which a person so circumstanced might experience, than to establish, in every case, a course of practice so highly injurious to the feelings of every man appearing as a witness. But that even here, the party is not without remedy: if he makes it appear to the satisfaction of the Court, that he was surprised by the appearance of a stranger; that such stranger is a man of infamous character, or that the evidence which he has given is untrue, and can be contradicted by other witnesses; the Court, exercising a sound and equitable discretion, may send the cause back to be reconsidered by another jury.

Unfortunately, no direct authorities are to be found either one way or other. Loose *dicta*, or equivocal expressions, are

all that occur to direct our judgment; and though there are some cases which seem to bear a strong analogy, yet it must be recollected that the argument thence arising is counteracted by what is admitted to have been the established and invariable practice for a considerable space of time.

Co. Lit. 158,
b.

Lord *Coke*, speaking of challenges to jurors, says, "If the cause of challenge touch the *dishonour* or *discredit* of a juror, he shall not be examined upon his oath; but, in other cases, he shall be examined upon his oath to inform the triers." As far as the case of a jurymen is analogous to that of a witness, this is certainly an authority in favour of those who maintain that such an examination is illegal; but it must be observed, that the same necessity does not exist in the case of a juror as does in that of a witness. The pannel is made out and known to the parties long before the trial; they have an opportunity of inquiring as to the characters and course of life of the persons named in it; and, if they find any thing which destroys the *competency* of a juror, they may be prepared to prove it. His *character*, in respect of matters which would not exclude him from sitting in judgment on a cause, and which forms so essential an inquiry when estimating the *credit* due to a witness, can never be the subject of inquiry; nor is it at all necessary for the purposes of justice that any such inquiry should take place; for if either party dislikes him, he may object to him without assigning any reason whatever; and may extend this peremptory challenge to such a number of jurors as is sufficient to remove the fears of the most cautious and timid. The case of a juror, therefore, differs materially from that of a witness, and as far as the credit due to the latter forms any part of the consideration of the jury, bears no analogy whatever.

Cooke's Case,
4 St. Tr. 748.
Salk. 153.
S. C.

But the case which has been principally relied on, on some late occasions, is that of *Peter Cooke*, who being indicted for treason, in order to found a challenge for cause, asked a jurymen, whether he had not said he believed him guilty; when the whole Court determined, that the jurymen was not obliged to answer the question.

Lord C. J. *TREBY* said, "You may ask upon the *voire dire*, whether he have an interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified, according to law, by having a freehold of sufficient value: but that you may ask a juror, or *witness*, every question that will not make him criminous, that's too large. Men have been asked, whether they have been convicted, and pardoned for felony, or whether they

have been whipped for petty larceny, but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal, nor subject to punishment, yet they are matters of infamy; and if it be an infamous thing, that's enough to preserve a man from being bound to answer. A pardoned man is not guilty; his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace him. So persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, or to Newgate for clipping or coining, &c. Yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

Mr. J. POWELL clearly considered this as tending to charge the juror with a crime, for after saying it might have been asked in a civil cause, because he might have been a referee, he added, "But, if you make it criminal, it cannot be asked, because a man is not bound to accuse himself." Mr. Baron POWIS adopted the same line of argument as the Chief Justice, saying, that though it did not make him infamous in the eye of the law, "yet that it was a shameful thing for a man to give his judgment before he had heard the evidence, and therefore that the prisoner ought not to ask him, to make him accuse himself, if it be opprobrious matter upon him." But it is observable, that he said nothing in respect of such questions being put to a *witness*.

As a decision, therefore, this case extends no further than what was before said by Lord COKE. The application of the doctrine to witnesses depends entirely upon the *dictum* of Lord CH. JUST. TREBY, who mentions no particular instance in which it had been so applied. It is, nevertheless, the *opinion* of a great Judge, and as such not to be lightly or irreverently treated.

The last authority which I find in the books, is what is said by Lord HARDWICKE, presiding as Lord High Steward, on the trial of Lord *Lovat*, where Lord TALBOT proposing to ask a question of one of the witnesses before he was sworn, Lord HARDWICKE said: "The ordinary method of proceeding in these cases is, that when a witness is produced, he is to be sworn in chief, unless there be some objection to his competency; and then he is to be sworn upon a *voire dire*. After he is sworn in chief, the party who produces him asks him such questions as he thinks proper. After which the other party is at liberty to

Lord Lovat's
Case, 9 St.
Tr. 670.

cross-examine him, either to the matter of fact concerning which he has been examined, or any other matter whatsoever, to impeach his credit or weaken his testimony; provided the questions that are asked are such as the law allows."

It is observable, that Lord HARDWICKE makes no distinction as to the nature of the incompetency which may be inquired into on the *voire dire*; but the qualification which is added by him as to questions on the examination in chief, has thrown a degree of obscurity on what would otherwise have been very clear. It should seem, however, that his lordship could only have in contemplation, when he made that qualification, an examination as to *crimes* for which the witness would be punishable; for he expressly extends the power of cross-examination to matters concerning which he had been examined, or any other matter whatsoever which should tend to impeach his credit. He does not confine it to the explanation of what he had before sworn, or to the introduction of new matter as evidence in the cause; but he permits the party to inquire of the witness himself into matters foreign to the cause, merely for the purpose of impeaching his credit, or, in other words, of disgracing him. On the other hand, what is said by Lord Ch. Just. TAYLOR is decisive against such a mode of examination; and when we see that great authority on the one hand, and the uniform practice of the bar for a series of years countenanced, as it seems to be, by the opinion of Lord HARDWICKE on the other, we cannot but consider this as a doubtful point; and one which it is highly important should be judicially and solemnly decided.

CASES SINCE DETERMINED AND REFERRED TO IN PAGE 204.

Harris v. Tippet, 2 Campb. 637.—*Gloucester Lent Assizes*,
51 Geo. 3.

THIS was an action for not accounting for a promissory note given to the defendant to be discounted on behalf of the plaintiff.

A witness for the defendant was asked, in cross-examination, whether he had not attempted to dissuade a witness, examined for the plaintiff, from attending the trial, he swore positively that he had not.

DAUNCEY then proposed to call back the other to contradict him.

LAWRENCE J.—That cannot be done. You must take his answer.

DAUNCEY contended, that for the purpose of discrediting the witness, it was competent to shew that he had sworn falsely in this instance, and actually had attempted to dissuade the other from attending the trial.

LAWRENCE, J.—Had this been a matter in issue, I would have allowed you to call witnesses to contradict what the last witness has sworn; but it is entirely collateral, and you must take his answer. I will permit questions to be put to a witness as to any improper conduct he may have been guilty of, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers he gives. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion.

Dauncey and *Ludlow*, for the plaintiff,
Jervis and *Abbott*, for the defendant.

Weeks v. Sparke, 1 *Maule & Selwyn*, 679. (p. 493.)

Trespass for breaking and entering plaintiff's close, parcel of a common; defendant justified for a prescriptive right of common at all times, &c. Replication prescribed to use the place for tillage; and to support such prescriptive qualification of the general right claimed by the defendant, the plaintiffs offered evidence of reputation. The Judge received the evidence, and afterwards the Court held it was properly admitted, because although the right claimed by the plaintiff was by prescription, yet it was an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district.

Yewin's Case, 2 *Campb.* 638.

LAWRENCE, J. laid down the same rule several times during the circuit; and it seems particularly illustrated by the following case, which occurred at *Monmouth*:—One *Yewin*, was in-

dicted for stealing wheat. The principal witness against him was a boy of the name of *Thomas*, his apprentice. LAWRENCE, J. allowed the prisoner's counsel to ask *Thomas*, in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged on him, and would fix him in *Monmouth* gaol?—He denied both.

The prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him. LAWRENCE, J. ruled that his answer must be taken as to the former, but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness.

No. IV.

MS. CASES CITED, THE NOTES WHEREOF ARE NOT CONTAINED IN
THE BODY OF THE WORK.

*The King v. The Inhabitants of Hammersmith. K. B. Sittings
at Westminster after Hil. Term, 1776. (p. 26.)*

ON a presentment for not repairing a road in the hamlet of *Hammersmith*,

Joseph Fitch, a witness for defendants, proved what an old man now dead had told him twenty years ago, about the boundaries of the parish of *Acton* and hamlet of *Hammersmith*; but the old man who told him was at that time an inhabitant of the hamlet: on which Mr. *Bearcroft* objected that this was not evidence, because the person who said it was interested at the time. But

Lord MANSFIELD said it was good evidence, for at that time there was no question or dispute about the matter, and it could not be supposed a man held a conversation for the chance of a dispute in order to make it evidence twenty years afterwards.

Washington and others, Executors, v. Brymer, K. B. Sittings at Guildhall after Hil. Term, 42 Geo. 3. (p. 51.)

DEBT on bond, dated 27th Sept. 1766, for 800*l.* conditioned for payment of 400*l.* and interest on the 27th Sept. 1767.

Pleas non est factum, solvit ad diem, solvit post diem,—a Release,—and a discharge under an Insolvent Act of 28th May, 1778.

To rebut the presumption of payment, the plaintiffs produced an affidavit made by the defendant on the 1st *July*, 1800, before a Master in Chancery, to whom it had been referred to take an account of the testator's personal estate; wherein he stated that the testator, *Michael Foster*, having three daughters, to each of whom he said he intended to give a portion of 1,000*l.*; the defendant in the year 1764, married one of them, and received a portion of 500*l.*; with an assurance that he intended to give him 500*l.* more at his death. That he (the defendant) being in want of money in 1767, applied to the testator to assist him, who then lent him 400*l.* on the bond in question, and being about six years afterwards again in distressed circumstances, he again applied to the testator to assist him; who refused, saying that he *had already had his share of his estate, that he might do as he pleased with what he had, as he should never call on him for it.* The affidavit then added, that the deponent conceived that the testator had cancelled the bond, and that he had never been applied to for payment by him.

The testator died in 1791.

ERSKINE, for the defendant, contended, that though this affidavit rebutted the plea of payment, it afforded strong evidence to presume a release by the testator. When a man promises to forgive his debtor, it must be presumed that he intends to do so by those means which the law points out, and as that could only be by a release under seal, it must be presumed that such release had been duly executed. The relationship of the parties to each other gives the strongest reason to presume that it was done; for the defendant relying on the promise of his father-in-law, could not be supposed to call on him to know whether he had executed a release or cancelled the bond as a stranger would; and the circumstance of the testator never having called upon the defendant for the money for twenty-three years together, was the strongest evidence in the world to shew that he did not consider this as a subsisting instrument.

GROSE, J. This bond was given by a son-in-law to his father-

in-law, it appears that he afterwards was told that payment would never be called for. He therefore had every reason to suppose that it was either cancelled or otherwise legally discharged. It is clear by the production that it was not cancelled; then a release might have been executed.

Verdict for defendant.

Attorney General and ———, for plaintiff.

Erskine and Lawes, for defendant.

Doe dem. Powell v. Harcourt, K. B. Sittings at Westminster after Easter Term. 39 Geo. 3. (p. 128.)

EJECTMENT for a piece of land situate in the parishes of *St. Leonard, Shoreditch*, and *St. Luke, Old street*, in the county of *Middlesex*.

The lessor of the plaintiff claimed this land under the will of her late husband, *Mr. Moffat*, who derived title from a family of the name of *Radcliffe*. Their title commenced by deeds of lease and release, dated 1st and 2d Feb. 1696, between *James Richardson* and *John Radcliffe*, whereby a certain piece of land called the *Irish Acre* was conveyed to *Radcliffe* in fee, which land was described as abutting on a piece of land called the *Harpe*. The plaintiff also proved receipt of rent by *Moffat*, her late husband, an old plan delivered by the defendant to the governors of *St. Bartholemew's Hospital*, in which the *locus in quo* was described as part of *Moffat's* estate; and that, unless this land was the plaintiff's, she had no land abutting on the *Harpe*; and that the prebendary of the moor of *St. Paul's*, as lessee of whom the defendant claimed, had without it eighteen acres two roods. She then produced in evidence a survey taken in 1649, by virtue of an ordinance of the Parliament, which was entitled as follows:—

“A surveye of certaine parcells of meadowe and pasture grounde in the countye of *Middlesex*, late belonginge to the prebendary of the moore with the cathedrall church of *St. Paul's, London*, made and taken by us whose names are hereunto subscribed, in the month of *October*, 1649, by virtue of a commission to us granted, grounded upon an act of the Commons of *England* assembled in Parliament, for the abolishinge of deans, and deans and chapters, canons, prebends, and other offices and tythes of and belonging to any cathedral, or collegiate church,

or chapel, in *England* and *Wales*,* under the hands and seals of five or more of the trustees in the said act named and ap-
pointed.

"All those eighteen acres of lands," &c. The lands were then particularly specified, and all together amounted to the exact number of eighteen acres.

The defendants attempted to account for the possession of the *Radcliffe* and *Moffat* families, by shewing that for many years they held the church lands in lease; and contended, that they being also possessed of other estates of their own adjoining and intermixed, encroachments had been made by them upon the prebendal estate; and that, in point of fact, this was not part of their freehold estate, but part of the land of the prebendary of the moor.

LORD KENTON.—The defendant cannot contradict the parliamentary survey, it has always been considered as conclusive. By the deeds of 1696, this property is described to be in the same posture as that in which it now remains, viz. as abutting upon the *Harpe*; and it appears that if this is not the land in question, the lessor of the plaintiff will have no land so abutting. The parliamentary survey, taken by those who were in possession of the church property, describes it with the utmost particularity; and the quantity of which the prebendary of the moor is now possessed agrees with this description. This is a very strong argument in favour of the lessor of the plaintiff; for the persons who then held the reins of government, and seized the church lands, wished to make the most of them, and would not have described them as of less extent than they really were.

Verdict for plaintiff.

Gibbs, Wood, and Peake, for plaintiff.

Erskine, Garrou, and Best, for defendant.

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- *Cooke and another v. Lloyd. Salop Sum. Ass. 1803, cor. Le Blanc, J. (p. 133, note.)*

THIS was an issue directed out of the Court of Chancery to try whether *Joseph Phillips* was the eldest son of *John Phillips* and *Mary* his wife, lawfully begotten. The issue was directed in consequence of a bill filed by the plaintiffs, who claimed under

* See this act in *Schober's* collection, 2 part, page 16.

Joseph Phillips against the defendant, whose father had purchased from *Philip Phillips*, an elder son, but who, it was contended by the plaintiffs, was born before the marriage of his parents.

The single point in the cause therefore was, when *John Phillips* and *Mary Phillips* were first married.

On the part of the plaintiff they called a great number of witnesses who spoke to declarations of the parents that they never were married till 1759; that the father when in anger called his wife a whore, and his children born before that marriage bastards; and that on his death-bed he pointed to *Joseph Phillips* as his heir, and the person to whom his estate (which was settled) would descend after his death; they proved from the register of the parish where they lived the entry of their marriage on the 16th *April*, 1759, previous to which *Philip* and several other children had been born. They also called the mother herself, who positively swore, that though she went to town for the purpose of being married in the Fleet, yet that in fact she never was married there nor any where else before 1759.

They also offered evidence of the declarations of *Philip Phillips*, who was dead, (made after he had conveyed to the defendant's father,) that he was a bastard; that all the world knew he was such; and that that was the reason of his selling the land so cheap to *Lloyd*, who might fight it out with his brother *Joseph*.

The defendant's counsel objected to this evidence, contending that nothing said by *Phillip*, after he had conveyed to *Lloyd*, could be received in evidence to prejudice his rights.

LE BLANC, J. said, that a declaration made under such circumstances was entitled to very little credit, and would avail nothing of itself, but that he thought it admissible as the representation of one of the family of the degree of relationship he bore to it.

This evidence was therefore received.

The defendant proved that the mother, whose name was *Mary Guess*, living in the service of *John Phillips's* mother, banns were published in the year 1747; that those banns being forbidden by his mother, he and *Mary Guess* went to London together for the purpose (as they said) of being married in the Fleet; that on their return, they gave out that they had been so married; that they afterwards lived on the estate, and were visited as man and wife by the neighbours, and at last by his mother herself. That on *June 7*, 1772, *John Phillips*, by an in-

strument under his hand, reciting that he had suffered a recovery of the estate, and being only tenant for life, had thereby committed a forfeiture, attorned tenant of the premises to *Philip* as his eldest son. That afterwards another recovery was suffered, to which *John*, as tenant for life, *Mary* as his wife, and *Philip* as his eldest son, and the remainder-man in tail, were parties. That on a motion in the Court of Common Pleas respecting this recovery, *John Phillips* and *Mary*, who to-day had sworn that she never was married, had made an affidavit wherein they swore that they had been married in the Fleet by one *Dare*, in the year 1747; and that the marriage in 1759, was only from greater caution to secure the wife after his death. To corroborate all this they offered the Fleet books, wherein this marriage was entered as having taken place on 28th *May*, 1747, and on LE BLANC, J. saying they were no evidence whatever, they called a witness who said that there being a question in the year 1761, as to this marriage, he examined these books then in the possession of a man who said he was clerk to Mr. *Dare*, and that the entry then stood in the books in the same state as it was now.

LE BLANC, J.—This evidence carries the case no further, the witness had no knowledge of the fact, but such as he derived from the books, which were no more evidence then than they are now; the entry is nothing more than a private memorandum made by somebody who had no authority to make it, and who might put down any thing he pleased, whether true or false.

The jury found for the defendant.

Williams, Serj. *Clifford* and *Abbott*, for plaintiffs.

Dauncey, *Wigley*, and *Winne*, for defendant.

Leeds v. Cooke and Wife. K. B. Sittings at Guildhall, after Hil. Term, 43 Geo. 3. (p. 145.)

ASSUMPSIT on breach of promise of marriage by the wife while sole. The defence set up was the improper conduct of the plaintiff; and, amongst other evidence, a Miss *Turpin* was called to prove that the plaintiff had, within three or four days after the elopement of Mrs. *Cooke* from her father's house, and before it was known whether she had married or not, written a letter to the witness containing an offer of marriage.

The witness had been served with a *subpoena duces tecum* to

bring the letter, and on being called said, that after that writ had been served on her, she had delivered the letter to the plaintiff. No notice had been given to him to produce it, and on an objection that for want of such notice, the witness could not speak to its contents.

Lord ELLENBOROUGH said, that being delivered to the plaintiff after the *subpœna duces tecum* had been served, and in fraud of that writ, in *odium spoliatoris*, parol evidence might be given. Otherwise a witness being the friend of the party against whom he was subpoenaed, might always avoid the effect of the subpœna by delivering over the paper to the party.

The witness could not be induced to recollect the terms of the letter, but another person by whom it was sent proved its contents; and this witness also proved a verbal offer of marriage to her a few days afterwards.

The plaintiff had 1s. damages.

Erskine, Gibbs, and ———, for plaintiff.

Garrow and Lawes, for defendants.

Keeling v. Ball. K. B. Sittings at Guildhall after Easter Term, 36 Geo. 3. (p. 146.)

DEBT on bond for 200*l.* made by *John Ball*, the brother of the defendant, and to whom he was heir at law.

The declaration stated, that the bond was lost by accident. Pleas *non est factum* and *solvit ad diem*.

The plaintiff called a witness of the name of *Russell*, who proved that the plaintiff had delivered him a bond, purporting to be the bond of *J. Ball* and *Edward Ball*, and that he afterwards applied to the deceased (*J. Ball*.) to pay the money due on the bond, when he acknowledged the debt and promised payment. He said that the bond was printed in *the common form*,* and that there were subscribing witnesses names, but that he did not know the names of those witnesses, nor by whom the bond was prepared. That he afterwards delivered the bond to *Carter*, the attorney, for the purpose of commencing an action against the deceased. *Carter* was next called, and proved that the bond was lost, while in his office.

GIBBS, for the defendant, objected that the plaintiff should

* Which includes the word *heirs*.

have called one of the subscribing witnesses to prove the execution of the bond, or else have shewn that such witness was dead. It had for a long time been doubted, whether such a mode of pleading, as the present, could be supported;* and Courts should not carry the indulgence too far. The plaintiff, in this case, might be in a better situation by reason of the negligence of his agent, than he would have been in had due diligence been used; for had the subscribing witness been called, the defendant might cross-examine him as to the nature of the transaction. The attorney, *Carter*, he contended, had been guilty of some negligence; for he might have kept a copy of the bond; and had that precaution been taken, the subscribing witness might have been called.

Lord KENYON said, that had it appeared who the subscribing witnesses were, the plaintiff must certainly have called them; but that it was the business of Courts of Justice, to apply the general principles of the law to new cases as they arise. This was a new case, for it did not appear that the plaintiff could, by any possibility, know who the subscribing witnesses were. If it was usual for men to keep copies of such instruments by them, the plaintiff's attorney, *Carter*, would certainly have been guilty of negligence, and the plaintiff could not avail himself of that negligence; but that was not the ordinary mode in which men conducted themselves. Suppose a fire had happened, and this bond had been destroyed by it, surely it would be adding calamity to calamity, to call on the party for more perfect evidence; and how could this case be distinguished from that? The general rule of law is, that the best evidence must be produced, which the nature of the case will admit of; and no better evidence could have been procured in the present case, than that which the plaintiff has given.

Verdict for plaintiff.

Garrow and Abbott, for plaintiff.

Cary v. Pitt, Esq. K. B. Sittings at Westminster after Easter Term, 37 Geo. 3. (p. 154. 156.)

ASSUMPSIT on a bill of exchange (drawn by one *Crofton*, against the defendant as acceptor. The defendant insisted that

* Vide *Reed v. Brookman*, 3 T. Rep. 151.

the acceptance was a forgery ; and amongst other evidence, the plaintiff called a witness of the name of *Coulson*, who was an inspector of franks at the Post Office, to prove that he had frequently seen franks pass the office in defendant's name (he being a member of Parliament,) and that, from the character in which those franks were usually written, he believed this acceptance to be the defendant's hand-writing. He had never seen the defendant write, nor received any letters from him.

Lord KENYON said this was not admissible evidence. The furthest extent to which the rule had been carried, was to admit a person who had been in the habit of holding an epistolary correspondence with the party, to prove the hand-writing, from the knowledge he acquired in the course of that correspondence ; a case reported by *Fitzgibbon*,* was the first in which such evidence was admitted. That evidence was admitted on sound principles ; for if, when letters are sent, directed to a particular person on particular business, an answer is received in due course, it is a fair presumption, that the answer was written by the person, whose hand-writing it purports to be ; but the franks sent to the office might be the defendant's hand-writing, or they might be forgeries, as well as the present ; for no communication was had on the subject with the defendant.

GARNOW then asked the witness, whether, having been used to detect forgeries, he could say whether this was a genuine hand-writing, or otherwise.

Lord KENYON said, he could not receive this, and observed that, though such evidence was received in *Revett v. Braham*, he had, in his charge to the jury, laid no stress upon it.

Verdict for the defendant.

Erskine, for defendant.

Da Costa v. Pym. K. B. Sittings at Guildhall after Trinity Term, 37 Geo. 3. (p. 154. 156.)

DEBT on bond.—Plea, usury.

The proof of the usury depended on the authenticity of an account purporting to be signed by the plaintiff. The plaintiff contended it was a forgery, which was the only question in the cause.

* *Lord Favers v. Shirley, Fitzg. 195.*

Several witnesses were called to prove the hand-writing, who said they believed it to be the plaintiff's. One witness, on being asked the usual question as to his belief, said it was like it; but he did not think it was the plaintiff's hand-writing, because he knew the plaintiff to be a man too well acquainted with the world to sign such an account.

ERSKINE contended, this answer was proper, and that it was like the case which arose on the hand-writing of *Ma. Mickle*, the translator of the *Lusiad*: *Mr. Caldecot* in that case was permitted to say, he thought it was not the hand-writing of *Mr. Mickle*, because he was a very correct man in making capital or small letters, where each was required, but in the writing produced, that correctness was not observed.

LORD KENYON said that it was a very different case from the present. *Mr. Caldecot's* observations arose from the *character of the hand-writing itself*, but this witness takes into his consideration facts entirely unconnected with and extrinsic from the hand-writing. The jury may take all circumstances into their consideration, but the witness should form his opinion from the character of hand-writing only.

Several notes signed, &c. by plaintiff were produced to the jury, but LORD KENYON said, the best rule was that laid down by *Mr. J. YATES*;^{*} for if the jury were to look at the papers, their judgment would depend on their knowledge of writing, which some might know better than others. It was best to rely on the evidence of those well acquainted with the character of defendant's hand-writing. The jury, nevertheless, were permitted to compare the different signatures.

Verdict for plaintiff.

Mingay, Gibbs, and Cooper, for defendant.

Erskine and Wood, for plaintiff.

Raven et al. v. Dunning and Chilton. K. B. Sittings at Guildhall after Trinity Term, 39 Geo. 3, (p. 226.)

IN this action of *assumpsit* both the defendants pleaded the general issue, and *Chilton* also pleaded his discharge under a commission of bankruptcy, on which issue was joined. The

^{*} In *Brookhard v. Woodley*, ante, 155.

plaintiff proved a joint contract, and then the defendant, *Chilton*, put in the commission against him and his certificate, which *Laro*, for the defendants, contended, entitled *Chilton* to a verdict immediately; and that when that verdict was entered, he might be examined as a witness for the other defendant, in the same manner as was daily done in the case of trespasses.

ERSKINE, for the plaintiffs, objected to his testimony. While defendant on the record, he cannot be a witness; and he cannot be delivered from the record until the plaintiff's counsel has replied, and the jury have deliberated. For aught that appears to the contrary, the plaintiff may prove that the certificate was obtained by fraud, or that he had lost money by gambling, or other misconduct which would avoid it. This differs from the case of trespasses, for here the plaintiff must prove a joint contract; and even in trespasses, the jury are never directed to acquit a defendant, unless the plaintiff has failed in making out any cause against him.

LORD KENYON said, he wished to admit the testimony, for the sake of the plaintiffs, (who had clearly proved their case,) lest, in case of a mistake on his part, the cause should come down again; but that if the plaintiff's counsel insisted on their objection, he must reject his evidence, being most clearly of opinion in his own mind, that he could not be a witness. In trespass, if the plaintiff proves any case, the defendant has always been called upon to answer it by other evidence.

ERSKINE persisted in his objection, and the witness was rejected.

Verdict for the plaintiff.—Damages 137*l*.

John v. Fothergill and others. Monmouth Sum. Ass. 1806.
(p. 239.)

TRESPASS for breaking and entering the plaintiff's slate quarry, to which the defendant pleaded *liberum tenementum*, in Sir *Ch. Morgan*, of the waste lands in *Bidwelty*, and that the *locus in quo* was part of those waste lands, on which issue was joined.

Several persons were called as witnesses for the defendant, who being tenants of the lordship of *Machin*, in which *Bidwelty* was, were entitled to rights of common on the waste; and on their testimony being objected to, the defendant produced releases from them of their rights of common on the *locus in quo*.

It was then objected, that notwithstanding this release, the witness was still interested in the event of the cause; for as other persons had rights of common, if any part of the waste were taken away, their cattle would consume more of the remainder than they otherwise would do, and there would consequently be less pasturage, &c. for the witnesses on the other parts of the waste; and

LE BLANC, J. thinking this a good objection, the witnesses severally executed fresh releases of all rights of common upon any part of the manor or lordship, and were then examined without further objection.

Doucey, Bevan, and Abbott, for plaintiff.

Williams, Serjt. Milles, Hughes and Peake, for defendant.

Monroe v. Twisleton. C. P. Sittings at Guildhall, after Mich. Term, 43 Geo. 3. (p. 248.)

ASSUMPSIT for the board and lodging of an infant child of the defendant.

To prove the contract, the plaintiff called Mrs. *Sandon*, who at the time of making it was the wife of the defendant, but had since been divorced from him by Act of Parliament, and was married again.

COCKLE, S. objected to her competence.

BEST, S. and PEAKE, contended that she was an admissible witness. It is true a wife cannot, while she remains so, be a witness either for or against her husband—not for him, because she has an interest to support his cause; nor against him, because it is the policy of marriage to create an union of interest and affection. When two persons are placed in the situation of man and wife, the law precludes every inquiry from either, which might break in upon the comfort and happiness of the married state, and therefore it will not suffer one to give evidence which may affect the other, because such evidence might, as Lord HALE expresses it, create implacable quarrels and dissensions between them. This lady, therefore, could clearly not have been a witness during the marriage, but the reason why she would then have been incompetent no longer exists: The bond of marriage is broken and at an end; the parties are in the same situation as if it had never existed, and the policy of the law no longer requires that terms of amity and friendship should subsist between them any more than between utter stran-

gers. In determining on the competence of witnesses, the Court is not to look to their situation at the time the fact happened to which they testify, but at the time they come to give evidence. If now competent, her situation at that time can make no difference, and such was the opinion of the Court of King's Bench in *Wyndham v. Chetwynd*,* where witnesses interested in a will at the time of subscription, but whose interest was removed at the time of giving testimony, were held competent. It is true that there were doubts of the propriety of the decision in that case, but an Act of Parliament afterwards passed to the same effect. It is no objection to say a witness was interested or infamous at the time of the transaction, if his interest or infamy has been since removed.

LORD ALVANLEY.—To prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or any thing else which happened during coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband, and miserable, indeed, would the condition of a husband be, if when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a Court of Justice. If she might be a witness in a civil proceeding, she might equally be so in a criminal prosecution; and it never shall be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever by the misconduct of one party, for misconduct alone can have that effect, the relation has been dissolved.

The plaintiff called other witnesses, and obtained a verdict.

Doe dem. Howell and others v. Lloyd, cor. Lawrence, J. Hereford Sum. Ass. 1806. (p. 164. 523.)

EJECTMENT for lands in Carmarthen.

Both parties claimed under one *Jno. Thomas*, who had devised the estate to several persons successively for life and in tail, with a reversion to his own right heirs; the lessor of the plaintiff contending that the reversion passed to her under the

* Ante, 234.

will of *David Thomas*, the eldest son and heir at law of the said *J. T.*—the defendant on the other hand contending that *D. T.* never made any valid will.

The will being above thirty years old, the lessor of the plaintiff called a clerk from the Ecclesiastical Court to produce it, and offered no evidence of the death or hand-writing of the subscribing witnesses.

When produced, the signature of the testator appeared to be a mere scrawl, quite illegible, evidently the attempt of some person to write, who, from weakness, or some other cause, was quite unable to do so; and one of the subscribing witnesses appeared to be a marksman. The lessor of the plaintiff had never been in possession of the land; the particular estates therein had continued till within the last twelve years, and during that time, till *January* last, the lessor of the plaintiff was under coverture.

It was objected, on behalf of the defendant, that under these circumstances the will could not be read without some evidence of its execution; for, in the first place, there was no possession under it to raise a presumption in its favour; and 2dly, the appearance of the instrument itself was such as to create a suspicion that it was not properly executed. The writing which purported to be the signature of the testator was not such as any literate man would make, in full possession of his faculties; and if it was to be considered as nothing more than a mark, one of the subscribing witnesses ought to have certified it to be so, by writing the mark of *D. T.* opposite to it.

LAWRENCE, J. said, that coming from the Ecclesiastical Court, which was the proper custody, and that Court having granted probate of it, the instrument proved itself; and as to the objection on account of the testator's hand-writing not being legible, the witnesses had in their attestation certified it to be signed by him; whether such signature was to be considered as a name or a mere mark, it was equally the signature of the testator, and attested as such by the witnesses.

The defendant then put in the original purchase deed of *John Thomas* in the year 1730, whereby the premises were conveyed to *Jno. Thomas* and one *Edw. Davies*, (who it was proved had survived *Thomas*), and their heirs, to the use of them and their heirs, in trust nevertheless as to the estate of *Davies*, for *Thomas*, his heirs, &c.; and on this evidence it was contended, that the plaintiff must be nonsuited for the want of a count on the demise of the heir-at-law of *Davies*, to whom the legal es-

tate survived. The plaintiff proved that *Thomas's* wife died in his life-time.

LAWRENCE, J. told the jury that the conveyance could only be taken in this form, for the purpose of preventing *Jno. Thomas's* wife from claiming dower in the lands, that such purpose had long since been completely fulfilled, and therefore they might presume that *Davies*, or his heir, had conveyed his legal interest to *Thomas*, after the death of his wife, or to some of his descendants since. Under this direction the jury presumed a conveyance, and found a verdict for the plaintiff.

Williams, S. and Dauncey, for the plaintiff.

Abbott, Peake, and Lord, for the defendant.

In the following term a motion was made to enter a nonsuit, on the ground that there was no evidence to presume a surrender, but the Court refused a rule to shew cause.

Knobell v. Fuller and another, cor. Eyre, C. J. Sittings after Trin. Term, 1797. (p. 478.)

In an action for a libel, the defendant may prove in mitigation of damages, any ground of suspicion short of facts, which would, if pleaded, have amounted to a complete justification, on the general issue.

ACTION on the case for a libel, published in the *Morning Post* of the 16th *January*, 1797, charging the plaintiff with being concerned with *Launcelot Knowles* in procuring money from the relations and friends of persons convicted of capital offences, under pretence of being able to procure pardons through the interference of the Duke of *Portland*, in whose service the plaintiff was.*

The defendant pleaded the general issue; and in mitigation of damages offered evidence to prove that though the plaintiff was not prosecuted for the offence, as *Knowles* had been, there was nevertheless strong grounds of suspicion against him.

The Chief Justice at first doubting the admissibility of this evidence.

* The following is a copy of the libel. "The proverb that one man may *steal a horse* while another dare not look over the *hedge*, was never more fully verified than in the case of the persons concerned in procuring pardons. *Launcelot Knowles*, evidently the *agent and dupe* of *Knobell*, has been tried and deservedly convicted; but the latter, the *honest and faithful* servant of his Grace of *Portland*, though the *principal* actor in the abominable practices, being a *foreigner*, and having good friends, is suffered to escape punishment, and permitted to enjoy the full exercise of his liberty. This is *justice* from an offender who ought at least to have accompanied his wicked acquaintance to *Botany Bay*."

ADAIR, S. for the defendants, admitted, that the defendants could not give in evidence on the general issue facts which, if pleaded, would have amounted to a justification ; but contended that they might prove facts which shewed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff, but for the purpose of conveying information to the public, this being a concern of a public nature ; and *Runnington*, S. who was on the same side, read a note of a case of *Curry v. Walter*, C. B. Sittings after Hil. Term, 36 Geo. 3, where *EYRE*, C. J. admitted the distinction, and received such evidence.

EYRE, C. J. said, he believed that in that case he admitted the evidence, in order to shew that the defendant had not in fact published a libel, he having only published the proceedings of a Court of justice, which the Court afterwards determined to be no libel in point of law ; but he would not deny, but he might also have received it in mitigation of damages ; for though he had never known the evidence given in an action for a libel, yet he had always understood that in an action for words, the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had a justification been pleaded.

The defendants then called Mr. *Ford*, a magistrate, to prove that on the examination of the plaintiff before him, he admitted that he had received five guineas for conveying a letter to the Duke ; and the Duke himself being examined, said, that thinking the plaintiff had misconducted himself in that respect, he had discharged him from his service.

The jury nevertheless found a verdict for the plaintiff (damages, 200*l.*) against the defendant *Fuller* ; the other defendant, not being proved to be a proprietor of the paper, a verdict was found for him.

Shepherd, S. for the plaintiff.

Doe dem. Bailiff and Burgesses of Clun v. Clarke and others.
Salop Sum. Ass. 1809. (p. 525, note.)

THIS was an ejectment against several persons who defended jointly.

On the opening of the case, it appeared that the defendant being severally possessed of cottages, which the lessors of the

plaintiff contended were within the wastes of the *borough*, and encroachments upon them, had severally paid rent to the corporation each for his own tenement. That afterwards they refused to pay more rent, and disputed the title of the corporation.

It was hereupon objected by *Abbott*, for the defendant, that the plaintiff could not proceed against more than one defendant, without proving them joint trespassers, and therefore, as they were now admitted to be several, he must make his election to proceed against one only.

But *BAYLEY*, J. said, that he thought this was not like a mere action of trespass, but that the plaintiff might recover from each defendant in a joint action, the tenement in his several occupation. This point, however, he saved for the opinion of the Court, if the defendant thought proper to move.

The defendant's counsel then cross-examined the plaintiff's witnesses, to shew that the waste on which the cottages were erected was part of the *lordship* of *Clun*, which belonged to Lord *Powis*, and therefore it was that they disclaimed to hold longer under the lessors of the plaintiff.

DAUNCEY, for the plaintiff, contended, that the defendants having paid rent to the lessors of the plaintiff, were estopped from controverting their title.

BAYLEY, J.—The defendants having disclaimed to hold under the plaintiffs, are not in the same situation as a tenant who has always admitted his landlord's title. The disclaimer was a notice that they meant to contest the title; and therefore, though I shall receive the payment of rent as *prima facie* evidence of the lessor of the plaintiff's title, and they are put thereby in the same situation as if they were defendants relying on their possession; yet it is merely *prima facie* evidence, and the proof of title in any other person will be an answer to such *prima facie* case made by the lessors of the plaintiff, and call on them to prove their title.

The defendants failing in proving that Lord *Powis* was entitled to the cottages, the plaintiff had a verdict against two of the tenants who had disclaimed; the others who had not disclaimed were acquitted for want of notice to quit.

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The reader is requested to refer to the following cases, (which have been determined, for the most part, while the work has been at press,) in the page prefixed to several paragraphs.

Pages 44 and 247.—*Campbell v. Twemlow*, 1 Price, 81. The Court of Exchequer inclined to the opinion, that a woman who had passed as the wife of a man, but was not so, could not be examined as a witness for him; and the Chief Baron mentioned an instance wherein Lord KENYON, when Chief Justice of *Ches-ter*, so ruled in a capital case.

p. 390.—*Goss v. Wallington*, C. P. Michaelmas, 2 Geo. 4. The Court held that, in an action against a surety, who had entered into a joint bond with his principal on his appointment to a public office, conditioned for payment of all monies received, and further, that the principal should from time to time enter into certain books all monies by him received; entries in such books by the principal, were after his death evidence against the surety; but they gave no opinion whether such entries would have been evidence without such a special clause in the condition, or with it in his life-time. They held that receipts given by him were not evidence.

page 194.—In *Smith v. Doe dem. Earl of Jersey*, 2 Br. & B. 473; 7 Price, 281, S. C. the mode of reserving rent in leases, granted previous to the creation of a power, was deemed evidence as to what was the usual and accustomed rent; and the like evidence was admitted and much relied on in *Doe dem. Earl of Shrewsbury v. Wilson*, K. B. Hilary, 2 & 3 Geo. 4.

page 591.—In *Winson v. Pratt*, 2 Brod. & B. 650, the Court of Common Pleas determined that a will was not cancelled by an unfinished alteration by the testator.

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p. 493.—The same Court held, that when rights be exercised on land in possession of tenant for twenty years, the presumption was, that the owner had knowledge of it, and the *onus* lay upon him to prove the contrary. *Gray v. Bland*, *ibid.* 667.

p. 402.—A lessee took a mansion house and farm, with exclusive liberty of sporting over all the lands within the manor, at the rent of 450*l*; the lessor not having the power of all the land, the tenant was warned off great part, and it was held, that the jury might give damages only to the value of the farm and house, without reference to the rent reserved. *Linson v. Day*, *ibid.* 680.

p. 242.—Assignee of bankrupt who has released his co-defendant as a witness to prove petitioning creditor's debt. *Tomlinson v. Wilkes*, *ibid.* 397.

p. 25, 26.—In the proof of a pedigree, the dying declaration of *A.* as to the relationship of the lessor of the plaintiff's person last seized, are not evidence. *Doe dem. Sutton v. Way*, 4 *B. & A.* 53.

p. 178.—A testator by his will devised to *Mather* his brother, and *Simon W.* his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of *Simon*, living at the time of the testator's death. Held that the proof of this fact did not remove the latent ambiguity in the will, so as to let in parol evidence of the declarations of the testator as to the person intended; but was clear that the person intended was *Simon*, the son of *A.* *Doe dem. Westlake v. Westlake*, *ibid.* 57.

p. 473.—On an information for writing, composing, and publishing a libel in the county of *L.* it appeared that the defendant on the 22d *August*, wrote and composed the libel in the county of *L.* that he was seen in *L.* on that and the following day. On the 24th the libel was delivered in the county of *M.* (10 miles off) by *A.* to *B.*, being enclosed in an envelope addressed to *C.* containing written directions to *A.* to forward the libel by whom it was subsequently published in *M.* The envelope was open; and it was not proved that there was on it any mark of a seal or post-mark. *A.* was not called on the trial to prove his business by either party; nor was it proved that he was a

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or had been about that time in *L.* Held, by three Justices, (dissentiente BAYLEY J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to *A.* in *L.*

Held, also, by three Justices, (BAYLEY, dubitante,) that a delivery at the post-office in *L.* of a sealed letter, enclosing a libel, is a publication of the libel in *L.* Held, also, by three Justices, (BAYLEY, J. dubitante,) where a defendant writes and composes a libel in *L.* with the intent to publish, and afterwards publishes it in *M.* that he may be indicted for a misdemeanour in either county.

And, *per totam curiam*, where a libel imputes to others the commission of a triable crime, held, that evidence of the truth of it is inadmissible. Held, also, where in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances; and that, if its contents were likely to excite sedition, &c. defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong, that this was a correct mode of leaving the question to the jury under 32 Geo. 3, c. 60, s. 1.

Qu. Whether the writing and composing a libel with intent to publish, but not followed by publication, be an offence. *The King v. Sir F. Burdett*, 4 B. & A. 95.

p. 502.—In trespass, the declaration was for taking goods, chattels, and effects; held that the plaintiff might recover the value of fixtures under these words. *Pitt v. Shew*, 4 B. & A. 206.

p. 548.—In assumpsit, by the provisional assignee of a bankrupt, defendant pleaded the general issue. Held that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignee, between the time of issuing the latitat and the delivery of the declaration, is no ground of nonsuit on a plea of non-assumpsit. *Qu.* Whether it would have been an answer to the action if specially pleaded. *Page v. Bauer*, 4 B. & A. 345.

p. 156.—Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence without proving the hand-writing of the steward. *Semble*, that

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the rule extends to all written documents coming from per custody. *Wynne, Bart. v. Tyrwhitt*, 4 B. & A. 371.

p. 247.—In trover by A. against B., C. is a compo-ness to prove property in himself. *Ward v. Wilkinson* A. 410.

p. 570.—The fact of a tenant for life not being seen of for fourteen years by a person residing near the though not a member of the family, is *prima facie* ev- the death of the tenant for life. *Doe dem. Lloyd v. B. & A.* 433.

p. 422.—A party on being asked for payment of his bill, admitted that there had been such a bill, but state had been paid to the deceased partner of the attor had retained the amount out of a floating balance in h
Qu. Whether, in order to take the case out of the 8 Limitations, evidence is admissible to shew that the never in fact been paid in this manner.

Semble, that such evidence is admissible, if at all, or the defendant states the debt to be discharged by means, to which he refers with precision, and where he signated the time and mode so strictly, that it is imp could be discharged in any other manner than that *Beale v. Nind*, 4 B. & A. 568.

p. 529.—Upon a parol demise, rent to take place following Lady-day, evidence of the custom of the c admissible to shew that by "Lady-day" the parties me Lady-day." *Doe dem. Hall v. Benson*, 4 B. & A. 588.

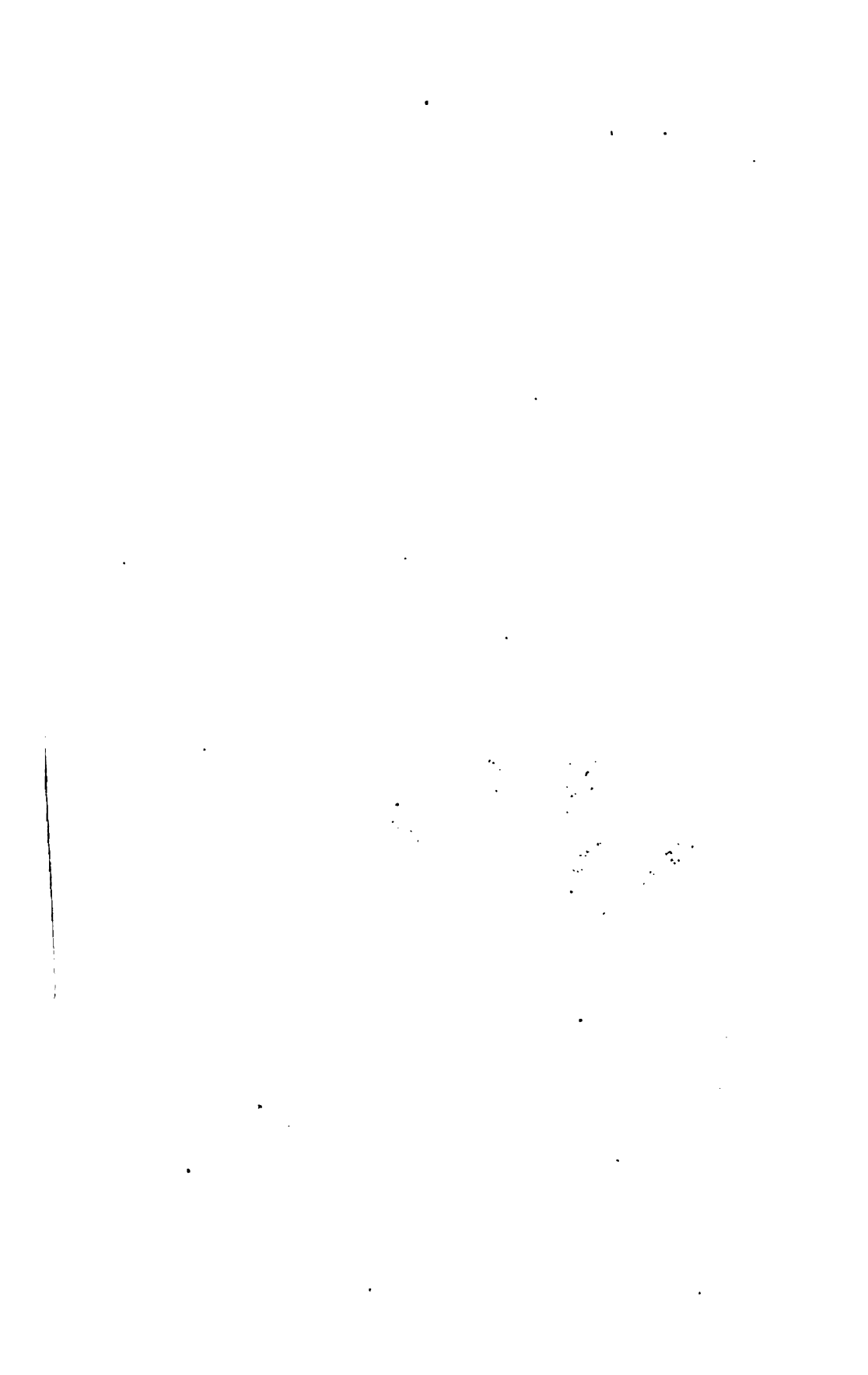
p. 621.—In consequence of the decision of *Rowe v* referred to in this page, the following Statute has been 1 & 2 Geo. 4, c. 78.—An Act to regulate acceptance of Exchange.

Whereas according to law, as hath been adjudged, bill is excepted payable at a bankers, the acceptance is not a general but a qualified acceptance: And w practice hath very generally prevailed, among mercha traders so to accept bills, and the same have among s sons been very generally considered as bills generally a or accepted without qualification: And whereas many have been and may be much prejudiced and misled

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practice and understanding, and persons accepting bills may relieve themselves from all inconvenience by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof; "Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of *August* now next ensuing, if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house, or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place."

II. And be it further enacted, that from and after the said first day of *August* no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill on one of the said parts.



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